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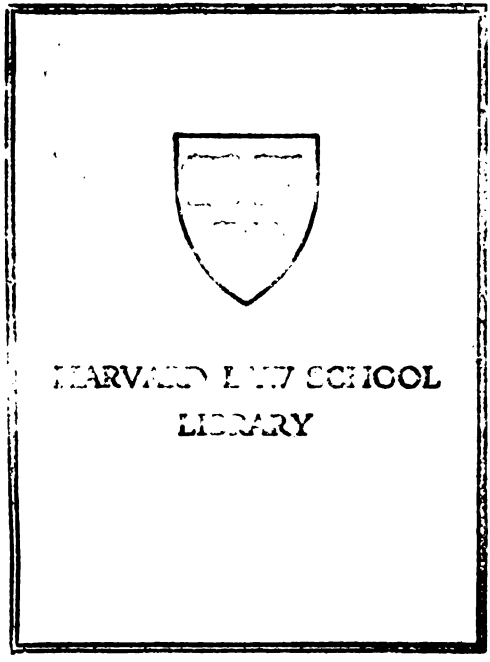

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REPORTS

OF SELECTED

CIVIL AND CRIMINAL CASES

DECIDED IN THE

COURT OF APPEALS

OF KENTUCKY.

By W. P. D. BUSH, Reporter.

VOLUME IV,

CONTAINING CASES DECIDED AT SUMMER TERM, 1868.
AND WINTER TERM, 1868.

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LOUISVILLE, KY:
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1869.

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By W. P. D. BUSH,

In the Office of the Clerk of the District Court of the United States for the District of Kentucky.

Rec Feb 16, 1872

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3d District—Hon. BEN. P. CISSELL, Henderson.
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4th District—C. W. MILLIGAN, Franklin.
5th District—BAKER BOYD, Owensboro.
6th District—MONROE ADAIR, Munfordsville.
7th District—J. W. SCHOOLING, Lebanon.
8th District—M. H. OWSLEY, Lancaster.
9th District—PHIL. LEE, Louisville.
10th District—J. LAWRENCE JONES, Richmond.
11th District—J. D. LILLARD, Owenton.
12th District—CHARLES DUNCAN, Falmouth.
13th District—ROBERT RIDDELL, Irvine.
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Hon. MORDECAI R. HARDIN, Judge, Louisville.
Hon. BELVARD J. PETERS, Judge, Mt. Sterling.
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ALVIN DUVALL, Clerk.
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TERMS OF THE COURT OF APPEALS.

Sessions held in Frankfort, Ky.

SUMMER TERM commences 1st Monday in June.
WINTER TERM commences 1st Monday in December.

RULE OF COURT, JULY 7, 1869.

The Clerk of this Court shall put no case on the Docket until the attorneys shall make a memorandum on the record of all the parties appellants and appellees, and the judgment appealed from, designating the page of the record and the term of the Court at which it was rendered.

☞ By appending at the end of their Briefs a full list of the authorities upon which they rely, Counsel will much oblige The Reporter.

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DECISIONS

OF

THE COURT OF APPEALS

OF KENTUCKY.

SUMMER TERM, 1868.

CASE 1—PETITION EQUITY—SEPTEMBER 21.

Overstreet vs. Rice.

APPEAL FROM TAYLOR CIRCUIT COURT.

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45b 1
e114 874
4bu 1
e133 577

1. "This is to certify that we, James W. Overstreet and Franklin W. Rice, have this day swapped farms, and the said Overstreet agrees and binds himself to pay to the said Rice one thousand dollars by the first day of March next, or the time of exchanging places, and the balance, seven hundred dollars, twelve months from time of exchanging places, this 31st December, 1866.

"J. W. OVERSTREET,
"F. W. RICE."

The parties exchanged possession of the farms February 21, 1867. Rice sued for the payment, and Overstreet defended upon the ground that the contract was not enforceable, &c. *Held*—That this instrument of writing does, at least, evidence a contract of mutual exchange of lands *in presenti;* and though it were not enforceable

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within itself, unaided by extraneous circumstances, for want of certainty in specifying what lands were exchanged, yet, when the parties, by their subsequent acts, have rendered this uncertainty sure by taking possession and consummating the mutual exchange, it is too late for either party, to say there is no memorandum in writing signed by the party to be charged, and especially when the vendor shows that he is both able and willing to convey, the vendee in possession, shall not be heard to set up such a defense.

2. If the written memorial of the sale of lands were voidable for uncertainty when first executed, this impediment may be removed by the subsequent acts of both parties.

3. Courts of equity will enforce a specific performance of a contract within the statute where it has been partly executed; for, otherwise, one party would be able to practice a fraud upon the other, which was not the intention of the statute. Great caution is to be used in the determination of what is a part execution. (1 *Story's Equity Jurisprudence, sec.* 759, *et seq.*; 4 *Bibb*, 466; 3 *Mon.*, 445; 3 *Littell*, 264.)

WILLIAM HOWELL and
T. C. WINFREY, For Appellant,

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1 *Johnson's Chy. R.*, 279–80; *Parkhurst vs. Van Courtlant.*

12 *Ves.*, 466; *Blagam vs. Bradbear.*

6 *B. Mon.*, 101–3; *Curd vs. Kay;* 1 *Dana*, 2–3.

4 *Bibb*, 466; *Ellis vs. Deadman's heirs.*

3 *Marshall*, 445; *Fowler vs. Lewis.*

3 *Littell*, 262; *Fugate vs. Hansford.*

1 *Johnson's Chy. R.*, 131; *Phillips vs. Thompson.*

1 *Bibb*, 205–6; *Grant's heirs vs. Craigwiles.*

Revised Statutes, chap. 22, 1 *Stanton*, 264–5.

2 *Marshall*, 490; *Rankin vs. Maxwell's heirs.*

CRADDOCK & TRABUE and
J. R. ROBINSON, For Appellee,

CITED—

6 *B. Mon.*, 100; *Kay & Casey vs. Curd.*

4 *Bibb*, 466; 3 *Littell*, 262.

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3 *Marshall* 445; *Fowler vs. Lewis.*
3 *Met.*, 583; *Harrow vs. Johnson, &c.*
2 *Duvall*, 156; *Warren vs. Barker & Co.*
1 *J. J. M.*, 76; *Rowland vs. Garman.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

These parties entered into the following written agreement, viz: "This is to certify that we, James W. Overstreet and Franklin W. Rice, *have this day swapped farms, and the said Overstreet agrees and binds himself to pay to the said Rice one thousand dollars by the first day of March next, or the time of exchanging places, and the balance, seven hundred dollars, twelve months from time of exchanging places, this 31st December*, 1866.

"J. W. OVERSTREET,
"F. W. RICE.

"Witness:—CRAM. HASKINS."

February 21, 1867, the parties did exchange, Overstreet moving from his farm, in Taylor county, to the one for which he had traded it from Rice, in Adair county, and Rice removing to the Overstreet farm, in Taylor county.

The first installment of one thousand dollars not being paid, Rice brought his action ordinary to recover it, March 19, 1867, to which Overstreet put in his answer and cross-petition, averring—

1. That no contract in writing as to said land trade had ever been entered into, but that it remained in parol, and was not, therefore, enforceable.

2. That Rice had no good and sufficient title to the Adair county farm, and prays an exhibition of his title.

3. That Rice had practiced a fraud on him in a misrepresentation as to where the lands were situated—representing that only some thirty of the three hundred and thirty-three acres lay southeast of the creek,

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among the hills, and the remainder on the opposite side being level bottom land, and much more valuable; whereas, about one hundred and fifteen acres lay among the hills southeast of the creek; and he prayed for a rescission, &c.

The cause was, on defendant's motion, transferred to the equity docket, after which, on March 10, 1868, Rice replied, asserting the contract in writing, the actual exchange of farms, averring that the last payment became due March 1, 1868; agreeing that he represented the whole tract to contain three hundred and thirty-three acres, but averring that it really contained much more; denied any misrepresentations, and exhibited his claim of title as coming from Andrew Barnett, deceased, who, and his vendees, had held over thirty years uninterrupted adverse possession; offering to convey by general warranty deed, upon payment of the purchase price; resisted any rescission or cancelment of the contract, and prayed as in his original petition—that is, "for judgment for one thousand dollars, with interest from 1st day of March, 1867, *and for all other and proper relief.*"

The court, on final hearing, adjudged that Overstreet should pay the one thousand seven hundred dollars, convey the Taylor county farm to Rice, and receive a conveyance from Rice to the Adair county farm; from which Overstreet prosecutes this appeal.

This instrument of writing does at least evidence a contract of mutual exchange of lands *in presenti*, and, though it was not enforceable within itself, unaided by extraneous circumstances, for want of certainty in specifying what lands were exchanged, yet when the parties, by their subsequent acts, have rendered this uncertainty sure by taking possession and consummating the mutual exchange, it is too late for either party to say there is

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no memorandum in writing, signed by the party to be charged; and especially when the vendor shows he is both able and willing to convey, shall the vendee in possession not be heard to set up such a defense?

If voidable for uncertainty when the writing was first executed—which, however, is not admitted—this impediment has been removed by the subsequent acts of both parties. It is clearly taught by *Story* (1 *Equity Jurisprudence, section* 759, *and through chapter* 18), that courts of equity will enforce a specific performance of a contract within the statute where it has been partly executed; for otherwise one party would be able to practice a fraud upon the other, which was not the intention of the statute. It is true, that great caution is to be used in the determination of what is a part execution. This case, however, comes within the most rigid rules.

In *Ellis vs. Deadman's heirs* (4 *Bibb*, 466), the writing sued upon was as follows: "4 January, 1808. Received of Jessee Ellis $——, in part pay for a lot he bought of me in the town of Versailles, *it being the cash part of the purchase of said lot.* Nathan Deadman." This court said, had the receipt specified the terms of the agreement, there would have been no doubt of the propriety of decreeing the specific execution; for though the receipt apparently intended only to evidence the payment made, yet it would, in that case, have been such a memorandum of the agreement as would have taken the case out of the provision of the statute. The amount paid was in blank, nor did it at all show the agreed consideration. The terms of the agreement between Overstreet and Rice are specifically set out; that is, the one farm for the other, and seventeen hundred dollars, to be paid in two unequal installments; the term "farms" is certainly as specific as a "lot" in a town.

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In the case of *Kay & Casey vs. Curd* (6 *B. Mon.*, 100), the order attempted to be enforced as a memorandum neither specifies the land nor the terms, hence was clearly within the provision of the statute of frauds.

In *Fowler vs. Lewis* (3 *Mar.*, 445), the letter signed by the agent of the vendor evidenced that another and previous contract had been made; but what the terms were remained to be ascertained by extraneous evidence, hence not enforceable.

But in *Fugate vs. Hansford* (3 *Litt.*, 262), upon the order of Fugate to the Trustees of the Town of Carlisle, in Nicholas county, to convey lot No. 32 to George L. Howard, *who has this day purchased the said lot from me, and for which I have received value in full*, November 2, 1816, this court held, whilst it did not import an obligation to convey, it still clearly witnessed a contract for the sale of land; and as the consideration had been received, and so far executed, no evidence need be introduced as to it, and, therefore, did not come within the statute in this case; though the town and county were named, the State was not.

Neither of these cases, therefore, militate against the enforcement of this contract, whilst the reasoning and principles of some justify it.

Andrew Barnett, deceased, by his last will, devised to his negroes a tract of six hundred and ninety acres on Casey's creek, Adair county; but, by a subsequent provision, he directed all the residue of his *real* and personal estate to be converted into money not previously devised; and as this was a tract of about three hundred and fifty acres originally, or the half of seven hundred acres patented to Alexander, it is pretty evident that it is not the tract of six hundred and fifty acres devised to the negroes, especially as it appears in evidence that

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he owned other lands on said creek, fortified as this evidence is by the long-continued, uninterrupted adverse possession, and this without any proof of claim asserted by the negroes.

Nor does the evidence establish any fraudulent representation by Rice; but, on the contrary, manifests that Overstreet, by himself and agent or friend, had examined Rice's farm several times, and then sought the exchange, and that there are really some twenty-odd acres more than it was said to contain.

The original petition at law only went for a judgment on the first payment of one thousand dollars, as the other was not then due; but the answer and cross-petition sought an adjudication in equity of the whole matter, and a rescission of the contract; and the reply averred the non-payment of the last installment, that it was due, and prayed for general relief.

It is evident that both parties were seeking an adjudication of all the matters in controversy; and, therefore, notwithstanding the pleadings are somewhat informal, yet, as all the matters have been heard, and conveyances properly decreed, we see no substantial error in adjudging to Rice the entire sum due him.

Wherefore, the judgment is affirmed, without damages, no supersedeas appearing in the case.

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CASE 2—PETITION EQUITY—SEPTEMBER 21.

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Webb vs. McCauley.

APPEAL FROM HARRISON CIRCUIT COURT.

1. Allowances made by county courts to jailers for fees and services as such, cannot be attached in the hands of the sheriff.
2. Fees and allowances to jailers being necessary, and provided by law, to enable them to discharge their official duties, public policy will not permit a creditor to attach these fees and allowances in the hands of the sheriff.

W. W. TRIMBLE, For Appellant,

CITED—

Revised Statutes, 1 *Stant.*, 473.
7 *Mon.*, 439; *Harvey vs. Divine.*
Civil Code, secs. 474–5; 1 *M. & B. Statutes*, 304.
Story's Equity Jurisprudence, sec. 1040, *p.* 294.
8 *Clark & Finnell's Rep.*, 295, 307; *Hill vs. Paul.*
2 *Brod. & Bing.*, 673; *Palmer vs. Bate.*
1 *Swanst. R.*, 79; *Davis vs. Duke of Marlborough.*

JOHN T. MCCLINTOCK, For Appellee,

CITED—

Civil Code, sec. 474.
5 *B. Mon.*, 141; *Kennedy vs. Aldridge.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

After the return of an execution issued upon a judgment of the Harrison circuit court in favor of appellee against I. N. Webb and others, indorsed no property found, to satisfy the same by the proper officer, this petition was filed by McCauley, the plaintiff in said execu-

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tion, against said Webb, Frazier, sheriff of Harrison county, Boyd, the county attorney, Roberts, a deputy sheriff, and J. O. Hodges, alleging in substance that said Webb was the jailer of Harrison county, and, on the 13th of April, 1868, he presented an account for two hundred and nineteen dollars and fifty cents to the county court thereof, for official services rendered by him, which was allowed by the court, and ordered to be paid out of any money on hand; that said sheriff, or his said deputy, or Boyd, the county attorney, had in their hands, or some one of them had funds in his hands, belonging to said Webb, or in which he had an interest, which he prayed the court to subject to the payment of his debt.

In an amended petition, he alleges that the claim of two hundred and nineteen dollars and fifty cents of Webb on the county was assigned by him, before the institution of this suit, to J. O. Hodges, for which Hodges paid nothing, and is under no obligation to pay anything, and that it was made by Webb to hinder, delay, and defraud his creditors.

The sheriff says it is his duty to pay the claim; that he has the money, and is ready and willing to pay the same as the court may direct.

Webb denies that he made the assignment to Hodges for the fraudulent purpose charged; admits his insolvency, and says he is unable to furnish fuel and other supplies for the court-house and county prison, which, by virtue of his office of jailer, he is required to provide, except by the fees of his office; and to enable him to procure the necessary supplies, and to perform his duties, Hodges advanced him money from time to time, and promised to continue to do so, to be remunerated out of the fees of his office; and he made the assignment in consideration

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of said advancements to him, and of the promise by Hodges to continue them.

Hodges admits Webb made an assignment to him of all his claims against the county of Harrison, and files the writing evidencing it, of date 19th December, 1867, but denies that it was made without consideration, or accepted by him with any purpose to aid Webb to carry out any fraudulent intent; that he, as jailer, at times needed advancements in anticipation of his fees to enable him to meet the expenses of his office, and in order to secure himself for advancements which he was willing to make in cash to Webb, for the purposes named, the assignment, as expressed by the said writing, was made; but when the claim of two hundred and nineteen dollars and fifty cents was allowed and ordered to be paid, Webb owed him nothing.

Upon these pleadings, and the exhibits filed, the court below adjudged that appellee's attachment be sustained, and that Hodges collect the two hundred and nineteen dollars and fifty cents, less fifteen dollars, and pay the same over to him, and for which Webb should have a credit on his indebtedness to McCauley; and to reverse that judgment Webb prosecutes this appeal.

The money ordered by the county court to be paid to Webb was, when this action was instituted, still in the hands of the sheriff of the county, who was the depositor or agent of the court, nor did the right to *it* pass by the assignment to Hodges, for that assignment is dated December 19, 1867, four months before this claim *was allowed*, and before the services were rendered or any articles were furnished, as appears on the account filed, and by the terms of the assignment it only embraced the *claim* of Webb against the county to its date, which claim,

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as is therein stated, then amounted "*to one hundred and thirty dollars or thereabouts.*"

The question then is, can this claim, under *section* 474 *of Civil Code*, be subjected in equity to the satisfaction of appellee's debt?

It is contended that the language of this section is broader and more comprehensive than that of the *act of* 1821, to subject equitable interests and choses in action to the payment of debts. (1 *Morehead & Brown's Digest*, 302.) The language of this *act* is not identical with the *section* referred to; but, with the exception that the words "*for the discovery of any money,*" are inserted in that *section*, and omitted in the *act*, there is no essential difference; and that omission is not material in the determination of this case, as the discovery of money in possession of the debtor, and its application as such, to the satisfaction of the debt, are not in issue. Was it intended by this section to put the debts owing by a county to its jailer on the same footing with the debts of individuals to him, to be subjected to the payment of his debts?

Jailers are county officers, required to perform certain duties prescribed by law, and which are necessary for the holding of courts in their respective counties. In order that justice may be administered, and the laws executed, these duties cannot be performed without the expenditure of money in various ways for supplies, and not unfrequently for services of others, in addition to those which they can render personally. In order to enable them to provide the things required of them, and to pay them for their labor, the law authorizes them to make out certain charges against their counties, which the county courts are to allow and provide for their payment; provision is also made for the payment of certain charges authorized by law, out of the State Treasury, to jailers.

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Those who have not the means on hand or cannot otherwise procure the necessary supplies, get them, as is shown in this case, on the faith that they will pay for them on the payment of their fees and charges against the county and State, or both, or by advancements by some friend in consideration of an assignment of the fees of the office in anticipation; and if they can be reached in the hands of the county treasurer or agent, and applied to the payment of debts arising out of totally different transactions, it must result disastrously to the public interests; and hereafter, in the selection of jailers, the extent of their fortunes would become a consideration of more importance than superior qualifications and moral fitness. Public policy, therefore, stands opposed to the construction of the *section supra* contended for.

If this fund, while it is in the hands of the sheriff, who is the agent of the county court or *quasi* treasurer, can be reached, and by the chancellor applied to the satisfaction of appellee's debt *pro tanto*, why can he not reach and make a like appropriation of the claim of Webb on the State for services performed by him, and which the State is legally bound to pay, after the Auditor has examined the same and issued his warrant on the Treasurer for the payment thereof to the satisfaction of the residue of the debt? If he cannot in the one case, he should not in the other. The paramount and controlling reason for the ruling in the case of *Divine vs. Harvie* (7 *Mon.*, 439) applies to the present case—in analogy and principle they are the same; and there has been legislative and judicial acquiescence in the construction of the act of 1821, *supra*, and the law as expounded in that case, for forty years. We do not concur in the suggestion that the ruling in that case has been changed by *section* 474, *Civil Code*.

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Such change would scarcely be made without an express provision and reference to claims of this character.

This case differs from *Kennedy vs. Aldridge* (5 *B. M.*, 145), in the important fact that here the money was, at the institution of the suit, in the hands of the agent of the county court, and not of Webb—there the money was paid by the State to the agent of its creditor.

Wherefore, the judgment is reversed, and the cause remanded, with directions to discharge the attachment and dismiss the petition to the extent that the allowance to Webb by the Harrison county court of two hundred and nineteen dollars and fifty-six cents is sought to be applied to the payment of appellee's claim.

CASE 3—MOTION—SEPTEMBER 22.

Stephens & Hermes vs. Farrar Brothers.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. Attorneys have a lien upon claims in their hands for collection, both before and after judgment, for reasonable compensation for services, whether the amount of the fee has been agreed by the parties or not. (*Act of January* 26, 1866, *Myers' Supplement*, 685.)
2. The institution and prosecution of a suit to judgment by the plaintiffs' attorney, as such, is sufficient notice to the judgment defendant that the plaintiffs' attorney has a lien upon the judgment for reasonable compensation for services.
3. When the defendant has reasonable notice of the attorney's claim and lien, the lien of plaintiffs' attorney on the judgment for a reasonable fee, as agreed by the parties, or adjudged by the court, cannot be defeated by the defendants paying or satisfying the judgment in full to the plaintiff in person, and taking his receipt in full satisfaction thereof.

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4. After the plaintiffs' attorneys had obtained judgment, on their motion the court ordered "that the clerk shall indorse on the execution which issues herein that the sheriff shall collect seventy dollars, which is allowed to said attorneys as a reasonable fee for their services, together with the costs of this suit." The execution defendants, by payment to the plaintiffs, obtained a receipt in full, upon the presentation of which to the sheriff he returned the execution satisfied. On motion of the attorneys, the sheriff's return was quashed.

MARTIN BIJUR, For Appellants.

CITED—

Act to amend chap. 4, *Rev. Stat., Myers' Sup.*, 685.

HARRIS & HAGAN, For Appellees.

CITED—

Act of 1866, *Myers' Sup.*, 685.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

Harris & Hagan, as attorneys for Farrar Brothers, of the State of Massachusetts, brought and prosecuted to judgment, in the Jefferson court of common pleas, an action against Stephens & Hermes, upon an account for seven hundred and twenty-five dollars and seventy-four cents.

It appears that an execution which was issued on said judgment was returned by the sheriff as satisfied, on the production to him of the following receipt of the plaintiffs:

"BOSTON, Nov. 7, 1866.

"Received of Stephens & Hermes the sum of three hundred and sixty-five dollars and thirty-two cents in full of all accounts, errors excepted.

"FARRAR BROTHERS."

In the meantime, the court, on the motion of said attorneys, Harris & Hagan, ordered "that the clerk indorse the execution which issued herein that the sher-

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iff shall collect seventy dollars, which is allowed to said attorneys as a reasonable fee for their services, together with the costs of this suit."

And afterwards, said attorneys moved the court to quash said return, and for an attachment against the sheriff for failing to obey said order of the court; and the defendants in the execution having entered their appearance to the motion, the same was sustained, and the return of the sheriff quashed; and from that judgment Stephens & Hermes have appealed to this court.

The principal question to be determined is, whether the payment to Farrar Brothers had the effect to extinguish the lien of Harris & Hagan on the judgment for a reasonable fee for their services.

The first section of an "act to amend chapter four, article one, title 'Attorneys,' of the Revised Statutes" (*Myers' Supplement*, 685), provides, "that attorneys at law shall have a lien upon any choses in action, account, or other claim or demand put into his or their hands for suit or collection, and upon judgments in actions prosecuted by him or them to recovery, where the judgment is for money, for the amount of any fee which may reasonably have been agreed on by the parties, or, in the absence of such agreement, for a fair and reasonable fee for the services of such attorney."

The motion to fix the attorneys' fees was of the class of special proceedings in which no written pleadings are required; but it is objected for the appellants that it was erroneous to make the order of allowance without notice to them. As the order did not increase the amount originally adjudged against the appellants, but operated to direct the payment of a part of it to Harris & Hagan, instead of Farrar Brothers, it is not certain that the legal rights of the appellants were so affected by the motion as

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to entitle them to notice; but assuming that they were, it sufficiently appears from the record that the appellants, by their counsel, were before the court by appearance as antagonistic parties, with Harris & Hagan, when the order was made.

As the evidence on which the court is supposed to have acted is not certified in the record, and no exception was taken to the order at the time, the allowance to the attorneys must be regarded as a just and reasonable compensation for their services.

But it is further contended that the statute, in its aspect most favorable to the attorneys, was only operative as between them and their clients, and especially so in this case, as appellants claim to have satisfied the judgment by payment to Farrar Brothers, without sufficient notice of the attorneys' lien.

As to the construction of the statute, it seems to us, that, to restrict its application to the proceeds of claims after collection, and in the hands of the attorney or collecting officer, or the client, leaving it in the power of the debtor at the end of a litigation which has resulted in a judgment against him to avoid the lien of the attorney by procuring a release from the plaintiff, would materially impair the force of the statute, and often render it useless. But, in our opinion, the statute is more comprehensive in its application, and operates to render the claim in litigation, both before and after judgment, subject to the attorneys' lien in the hands of the debtor.

If the appellants had discharged their liability by payment or otherwise, without reasonable notice of the attorneys' claim and lien, we do not doubt that, on well settled principles, such discharge or payment would have protected them; but we regard the institution and prosecution of the suit by the attorneys, in their names as

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such, as sufficient notice to the appellants of the existence of their claim for a reasonable compensation for their services, which the law secured by a lien on the subject of the action.

Wherefore, for the reasons indicated, the judgment is affirmed.

CASE 4—PETITION EQUITY—SEPTEMBER 23.

Champion, &c., vs. Robertson.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

1. *Sureties are exonerated* in a judgment on a note by the plaintiff's forbearing to issue an execution for more than a year, in consideration of ten per cent. advanced to him by the principal obligor, without the consent of the sureties in the note.
2. The obligee, when he made the contract for indulgence with the principal in the note, is presumed to have known that the other obligors were sureties, from the fact that the note was executed to himself.
3. Plaintiffs, before answer, have the right to file an amended petition alleging material facts, and the circuit court had no judicial discretion to reject it.

JOHN RODMAN and
W. D. GREER, For Appellants,

CITED—

7 *B. Mon.*, 468; *Bray vs. Howard.*
11 *B. Mon.*, 218; *Brank vs. Means.*
1 *B. Mon.*, 325; *Renningham vs. Bedford.*
8 *B. Mon.*, 382; *Duncan vs. Reed.*
Civil Code, sec. 159.

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C. BENNETT, For Appellee,

CITED—

2 *Met.*, 25; *Neel vs. Harding.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In a petition in equity filed by the appellants against the appellee for enjoining a judgment he had obtained against them on a note to him signed by them and another, and for obtaining a decree of exoneration on the ground of unlawful indulgence, the appellants allege that they were only sureties, and that, without their consent, he had forborne to issue execution for more than a year in fulfillment of an agreement to that effect he had made with the principal obligor without their knowledge, for the binding consideration of ten per cent. advanced to him by their principal.

The petition was never answered; nevertheless, a rule was made on the appellants to prepare their case on the presumed ground that the petition had not alleged that the appellee knew that the appellants were mere sureties, the note not showing that fact on its face; and though, at a subsequent term, the appellants offered an amendment alleging that fact, yet the circuit court refused to permit the filing, and dismissed the petition without prejudice.

That judgment is palpably erroneous. There was no necessity for a specific charge that the appellee, when he made the contract for indulgence, knew that the appellants were sureties. That knowledge is presumed from the simple fact that the note was executed to himself. But, had such allegation been material, the appellants had, before answer, the legal right, under the Code of Practice, to file the amended petition, and the court had no judicial discretion to reject it.

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If the allegations of the original petition be true, the appellants are clearly entitled to the relief sought. Their truth not being denied, stands, so far, admitted.

The judgment, so replete with error, is reversed, and the cause remanded for further proceedings consistent with the foregoing opinion.

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CASE 5—PETITION ORDINARY—SEPTEMBER 23.

Hikes vs. Crawford & Long.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. A note, executed by one partner in his individual name, for the use and benefit of the firm, is binding against the other partner who did not sign the note. A surety in such a note, after he has paid it, has a cause of action against the firm.
2. A surety's right of action against his principal does not accrue until he pays the debt.
3. The statute of limitations does not commence to run against a surety *when he replevies the debt* of his principal; but it commences to run against him *when he pays the debt.*

CLEMMONS & WILLIS, For Appellant,

CITED—

3 *Metcalfe*, 500; *Burrus vs. Anderson.*

1 *Metcalfe*, 253; *Hoskins vs. Parsons.*

3 *B. Mon.*, 8; *Burrus & McConnoughy vs. Parrish.*

2 *B. Monroe*, 303; *Kouns vs. Bank of Kentucky.*

3 *Dana*, 68; *Buford vs. Francisco.*

Sess. Acts, 1867, *page* 35.

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WM. MIX and
MARTIN BIJUR, For Appellees,

CITED—

21 *How.*, 97; 19 *How.*, 233; 26 *Barb.*, 614.
10 *Abb.*, 478; 13 *Abb.*, 268; 1 *Bos.*, 570.
12 *Barb.*, 215; 4 *Duer*, 261; 6 *Bosw.*, 66, 154.
3 *B. Mon.*, 8; 1 *Mon.*, 90, 249; 1 *Met.*, 251.
6 *Mon.*, 190; 4 *B. Mon.*, 305; 2 *B. Mon.*, 303.
1 *Bush*, 474; *Joyce vs. Joyce's adm'r.*
16 *B. Mon.*, 351; *Merrett vs. Pollys.*
Collyer on Partnerships, secs. 414, 473–4–5–6–8.
6 *Mon.*, 492–5; *Beard vs. Smith.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Crawford and Long formed a copartnership, for the purpose of carrying on the dairy business. Long contracted a debt with Mrs. Fisher for borrowed money and the hire of a negro man, and gave a note therefor, with appellant as his surety. The services of the slave were devoted exclusively to the business of the firm, and the money borrowed was all applied in the same way, and was borrowed for that purpose. Long, however, signed his individual name to the note, and he and Hikes were sued upon it. The action was discontinued as to him, and judgment rendered against Hikes alone. He then replevied the debt, with Long as his surety, who signed the replevin bond as he did the note, not putting the firm name or that of Crawford's to the bond.

Hikes paid off the bond after its maturity, and brought this action against Long & Crawford for the amount he had thus paid for the firm. Crawford, at the proper time, put in an answer traversing the material facts alleged against him; and afterwards, when the action was set down for trial, asked leave of the court to file an amend-

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ed answer, relying upon the statute of limitations as a bar, and filed the affidavits of himself and attorney, setting forth reasons why this defense was not relied upon in the first answer. For the reasons stated in these affidavits, the court below permitted the supplemental answer to be filed, and appellant excepted.

The law and facts were then submitted to the judge, who decided that the debt was merged or satisfied by the execution of the replevin bond by Hikes, and his cause of action then accrued against Crawford; and as more than five years had elapsed from that period to the commencement of this action, appellant was barred, and so adjudged, and Hikes seeks by this appeal to reverse that judgment.

Was the court below right in determining that the cause of action accrued to appellant upon the execution of the replevin bond?

Crawford was undoubtedly bound by the original note executed to Mrs. Fisher, as it was for the benefit of the firm of which he was a member; and if he had been sued on it, with the proper allegations, she could have recovered her judgment against him, as well as against Long and Hikes, and the latter only was the surety of the firm. The original judgment, as is admitted, did not merge the debt, and the plaintiff therein might have sued Crawford & Long, notwithstanding that judgment; nor would the replevin bond have opposed a bar to an action against Crawford, unless he was bound therein by the signature of Long—the bond only had the force of the judgment; and the plaintiff had no more and no others bound for her debt after the execution of the bond than she had on the original debt.

But if, after the execution of the bond by Long, Crawford, as the partner of the firm for which the debt was

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contracted, and for which Long had the power to bind Crawford, was also bound, then appellant had no cause of action certainly; and, from the facts appearing in this case, there is no reason why Crawford should not be bound by the execution of the bond by Long, and was not released from his responsibility to Mrs. Fisher thereby, and was under no *legal* responsibility to appellant until he had paid the debt to the plaintiff; and the statute did not commence running until that period, viz: the payment of the money.

Whether or not the court below transcended a sound or judicial discretion in permitting a plea of this character at so late a period after the pleadings had been made up, and the case was set down for hearing, we need not now decide; but, for the reason herein stated, the judgment is reversed, and the cause is remanded for a new trial, and for further proceedings consistent herewith.

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CASE 6—PETITION EQUITY—SEPTEMBER 23.

O'Neal vs. Bannon.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The purchaser of real estate sold under a decree of the court, as prescribed by the *act of August* 23, 1862, entitled "*An act authorizing the sale of real estate and slaves, in which there is a future contingent interest* (*Myers' Sup.*, 426), by complying with the terms of the sale prescribed in the decree, is vested with all the title of the present and future, or contingent claimants, to said real estate.
2. The purchaser of real estate, *sold under a decree of court* for reinvestment, *cannot be prejudiced by the failure of the court* to provide for the securing and reinvestment of the proceeds of the sale, and securing the title thus acquired to all who may be interested therein.

BARRET & ROBERTS, For Appellant,

CITED—

Act of Aug. 23, 1862, *Myers' Sup.*, 426.
Civil Code, secs. 34, 35, 36.

HAMILTON POPE, For Appellee.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted by O'Neal, the purchaser of a part of a lot of ground within the limits of the city of Louisville, sold by virtue of a decree of the Chancellor, in a suit prosecuted by William Bannon against Christopher Brannin and others, all of the parties being devisees of William Bannon, sr., deriving the interests they have to the land sought to be sold under the will of said testator.

The title to this real estate is derived through the will of said testator, in which there is certainly a contingent

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interest, depending on events which may hereafter happen; but the person or persons who may take a future interest in said estate are not now ascertained, because of the non-happening of the event on which the interest depends.

The plaintiff in the action, William Bannon, has a present and vested interest in the use of the estate, and the other devisees are defendants to the action, who, upon certain contingencies, may take the estate, and who must be deemed the representatives of those who in the future may, on the happening of the events provided for in the will, take the estate.

It is satisfactorily shown by the evidence that the interests of those who can claim the estate, both present and future, will be subserved by a sale of the entire estate.

The case, therefore, seems to be fully made out, in which, by virtue of the act of 23*d August*, 1862, entitled "An *act authorizing the sale of* real estate and slaves in which there is a future contingent interest" (*Myers' Sup.*, 426), a sale is authorized.

By the purchase of real estate at a sale made under the decree of a court, as prescribed by said act, it is declared in *section* 1 thereof, that the purchaser thereof, by complying with the terms of the sale prescribed in the decree, shall be vested with all the title of the present and future, or contingent claimants, to said real estate.

The other sections of the act provide for the securing and reinvestment of the proceeds of the sales, prescribing the duty of the court in relation thereto, and how the title shall be secured to all who may be interested.

But the purchaser cannot be prejudiced by the failure of the court to effectuate these provisions, and in this case the Chancellor has retained the cause for the pur-

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pose of reinvestment, as required by the act, as appears in the decree.

The Chancellor was, therefore, authorized by the act *supra* to decree the sale of the property; his decree conforms to its provisions, and cannot be annuled without an abrogation of the act.

Wherefore, the judgment is *affirmed*.

CASE 7—PETITION EQUITY—SEPTEMBER 25.

O'Bannon & Bashaw vs. Miller & Hopkins.

APPEAL FROM LOUISVILLE CHANCERY COURT.

Each partner has a lien on the firm property. The creditors of the firm are entitled to that lien, by equitable substitution; and that lien, by subrogation, is paramount to attachment liens, created on debts which are not partnership debts.

HARRISON & BENNETT, For Appellants,

CITED—

2 *Met.*, 360; 3 *Kent's Com.*, 65.
14 *B. Mon.*, 198; 7 *B. Mon.*, 210; 2 *B. Mon.*, 405.
1 *Bush*, 359; 2 *Duvall*, 170 *and* 432.
Story on Part., *secs.* 135, 136, 357, 360, 674, 675, 1253.
Parsons on Part., *pp.* 266, 345, *and note.*
5 *B. Mon.*, 170–1.

HAMILTON POPE, For Appellees,

CITED—

Civil Code, *sec.* 253.
Story on Partnerships, *secs.* 97, 358, 261, 460.

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3 *Kent's Com., pp.* 64, 65.
13 *B. Mon.*, 414; *Wilson vs. Soper.*
2 *Metcalfe*, 360; *Jones, &c., vs. Lusk.*
6 *B. Mon.*, 129; *Pearson & Anderson vs. Keedy, &c.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

As each partner had an implied lien for his own security on the partnership property, the appellants, as creditors of the firm for property sold to it and appropriated to its own use, are entitled to that lien by equitable substitution.

The notes to the appellees, Miller & Hopkins, do not show on their face that they were partnership debts, but import the contrary; nor is there any proof, or even allegation, that either of them was such a debt, or that the money recited as loaned was borrowed for, or was appropriated to, partnership use. The appellees, therefore, showing no other than their attachment lien, that, though prior to the mere attachment lien of the appellants, must be postponed to their antecedent lien by subrogation, and which is paramount to every other lien on the attached partnership property.

The court below seems, therefore, to have erred in giving priority to the appellees.

Wherefore, the judgment is reversed, and the cause remanded for a judgment first satisfying the debt due to the appellants.

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CASE 8—PETITION EQUITY—SEPTEMBER 25.

Rutherford's heirs vs. Clark's heirs.

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91 94
4bu 27
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APPEAL FROM LINCOLN CIRCUIT COURT.

1. Objections to authentications may be answered by presumptions resulting from lapse of time and otherwise.
2. When proof of heirship is as precise and satisfactory as so long a lapse of time, and the number of claimants, would reasonably enable such parties to obtain in any case, the law requires no more.
3. Power to sell land to pay debts and legacies is peremptory on the executor, and is, in no sense, a directory power.
4. A Virginia executor, under a will probated in that State, has no power to sell lands of his testator, situated in Kentucky, until after probate and qualification in Kentucky. Sales of lands in Kentucky by such executor, before probate and appointment or qualification in this State, are void.
5. The statute of 1810 authorized an administrator *de bonis non* to exercise all the powers of the original executor.
6. The bond of an administrator executed in a Kentucky county court in 1847, is not void, because all the obligors therein were residents of Virginia. As there was no law prohibiting it, the court will not adjudge it illegal.
7. A Virginia executor, without power to sell, had no power to lease the lands of his testator situated in Kentucky, otherwise than as the agent of the heirs and devisees; and tenants under his leases were, in law, their tenants, and such tenants could not rightfully or availably attorn to any other claimant than the equitable or legal reversioner.
8. When a will directs a sale of real estate, if necessary for the payment of debts or legacies, a purchaser at any such sale not being presumed to know the condition of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale and consequent want of authority to make it. In this case the purchasers are presumed to have seen the will and to have had reasons to apprehend that neither

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unpaid debts nor legacies required the sale of the land, and the sale and conveyance are canceled and held to *have been unauthorized and constructively fraudulent.*

9. Rutherford died, and his will was probated in Jefferson county, Virginia, in 1805. His will authorized his executor to sell his lands in Virginia and Kentucky, if necessary, to supply any deficiency in his personal assets in the payment of his debts and legacies. By a settlement made in the Virginia court in 1822, it appears that his estate was then indebted to his original executor, then deceased, nine thousand dollars, on account of debts and legacies paid in excess of assets received. In 1847, the then administrator *de bonis non*, in Virginia, had the will probated and himself appointed administrator in Kentucky, and the same year conveyed a tract of land, in Laurel county, for a very inadequate consideration. Suit of Rutherford's heirs to cancel and set aside the sale and conveyance, was dismissed by the circuit court. The decision of the circuit court is reversed, and the sale and conveyance held to be unauthorized and constructively fraudulent.

JOHN KINCAID and
THOS. N. & D. W. LINDSEY, For Appellants,

CITED—

Act of 1797, *secs.* 10, 13, *B. & M.*, 1542.
Act of 1820, *M. & B.*, 1548.
Act of 1842, *Lough.*, 545.
Act of 1810, *M. & B.*, 671.
3 *Marshall*, 380; *Brown vs. Hobson.*
1 *Dana*, 304; *Simpson vs. Hawkins.*
Revised Statutes, 1 *Stanton*, 513.

A. J. JAMES and
F. T. FOX, For Appellees,

CITED—

1 *Littell*, 258; *Owings vs. Beall.*
3 *Marshall*, 303; *Embry vs. Miller.*
4 *Bibb*, 484; *Carmichael vs. Elsendorf.*
3 *J. J. Mar.*, 249, 250; *Coleman vs. McKinney.*
2 *Bibb*, 387; 2 *Bibb*, 220.

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1 *Metcalfe*, 101–2; *Coffey vs. Wilkinson's heirs.*
5 *N. Y.*, 483; 9 *N. Y.*, 241.
9 *Johnson*, 55; 12 *Johnson*, 488.
10 *Johnson*, 172; 13 *Johnson*, 406.
4 *Mon.*, 376; *Stitte vs. Jones.*
1 *Dana*, 390; *Swearingen vs. Fields.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Robert Rutherford, a citizen of Virginia, domiciled in Jefferson county, in that State, died in the year 1805, leaving children, and a will published in the year 1802, which was proved and recorded in the proper court of probate; and on the 12th of June, 1805, John Morrow, one of several nominated executors, alone accepted, executed bond, and acted as sole executor.

Apprehending some insufficiency of personal assets for the payment of debts and legacies, the testator, owning lands in Virginia, and in Lincoln (now Laurel) and in Mercer (now Anderson) counties, Kentucky, authorized his acting executors or executor to sell land in Virginia or Kentucky for supplying any such deficit.

A county court settlement of his fiducial accounts, made in the year 1814, brought the estate in debt to Morrow, as executor. Another like settlement in the year 1819 increased that indebtedness, and Morrow having died in the year 1820, a confirmatory and supplemental settlement between his administrator and Rutherford's administrator, *de bonis non*, increased the indebtedness to a fraction over nine thousand dollars.

In the year 1833, the administrator *de bonis non* having been removed, William C. Worthington, of Virginia, was appointed in his place by the same county court, and executed the requisite bond, with other Virginians as his approved sureties.

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Morrow, before his death, had appointed Lot Pitman, of Laurel county, Kentucky, an agent to take care of a tract of six thousand four hundred and thirty-seven and one third acres of land owned by the testator in that county; and under that authority Pitman leased the land to several tenants, who occupied it until about the year 1837, when Frank Clark procured an attornment to himself.

Worthington having empowered Pitman to sell the land, he sold the whole tract to Clark and Bright in 1837. By this contract Worthington, for the consideration of four thousand one hundred dollars, agreed to convey the legal title whenever he should satisfy the vendees that the sale was necessary for the payment of debts.

On the 8th of March, 1847, Worthington, on filing copy of the will and probate certified from the county court of Jefferson, Virginia, obtained the appointment of himself as administrator *de bonis non*, by the county count of Anderson, Kentucky, and executed the statutory bond with non-resident sureties; and, on the 17th of March, 1847, he, as such administrator, with the will annexed, conveyed to Bright and Clark the said tract of land, excepting about one thousand acres, which one Brown had recovered, and the relative value of which was to be deducted from about two thousand one hundred dollars of the consideration still unpaid, and not to be paid until the amount to be deducted should be adjusted.

The appellants, having been non-suited in two successive actions of ejectment, brought a third, and also filed their petition in equity, denying that the sale was made for debt, the existence of which they do not admit, denying also Worthington's authority to sell, and charging a fraudulent combination between him and his ostensible vendees, and praying, therefore, for a cancellation of the

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conveyance, &c. These pleadings were consolidated, and Clark, who, in the meantime, had bought Bright's interest, traversed most of the material allegations, and pleaded in bar more than twenty years' adverse possession.

After elaborate preparation, the circuit court dismissed the consolidated action.

The right of the appellants to sue as heirs; the jurisdiction of the Anderson county court to appoint Worthington administrator; the existence of any debt for paying which his sale was necessary; his power of sale, and the statute of limitations, are all involved in the revision of the judgment.

There being no proof of actual fraud, and the objections to documentary authentication being answered by presumptions resulting from time and otherwise, we shall not specially notice those unavailing matters, but will confine our attention to the more essential questions raised by the pleadings as previously suggested.

1. The proof of heirship is as precise and satisfactory as so long a lapse of time, and such a great multitude of claimants, would reasonably enable such parties to obtain in any case, and the law requires no more. Before the sale of the land the legal title descended to the testator's heirs. The devise to them of land which might remain unsold did not transform them into devisees of this tract sold by Worthington, unless his sale was void; and for vacating the sale we consider it immaterial in which character they sue, as they claim in one or the other, according to the result of the suit as to the validity of the sale.

2. It sufficiently appears, that when Worthington's Kentucky appointment was made the testator owned land in Anderson county, and this gave an elective juris-

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diction to either Anderson or Laurel county court; and why Anderson was preferred, this court neither knows nor needs to inquire. It is no badge of fraud, and especially as we are authorized to presume that Worthington also had sold, or intended to sell, the land in Anderson.

But, waiving the positive evidence as if admitted to be sufficient, the simple exercise of jurisdiction, and long acquiescence in it without opposing evidence, are amply sufficient for the recognition of it by this court. (*See Owings vs. Beall*, 1 *Littell*, 258, *and other Kentucky cases*.)

3. The power to sell land for the payment of debts depended on the sole condition of a failure of personal assets to fulfill that duty. It was therefore a peremptory, and, in no sense, a discretionery power, and might, consequently, have been lawfully exercised by the acting executor in Virginia, though not in Kentucky, without probate and qualification here. A Kentucky statute of 1810, exclusively applicable to fiduciaries appointed in this State, authorized an administrator *de bonis non* to exercise all the powers of the deceased executor or executors. Under this enactment, Worthington had all the power to sell land in Kentucky which the original executor had to sell land in Virginia, unless, as urged by the counsel of the appellants, his fiducial bond was void because all the obligors were residents of Virginia; and however improvident the acceptance of the bond of non-residents may have been, there being no law forbidding it, this court cannot adjudge it illegal. Then, whether Worthington had power to sell and convey the land in Laurel, depends on the sole question whether the payment of debts or legacies required the sale.

4. But if there was no such necessity, and the sale therefore was void, the statute of limitations will not protect the purchasers. Their possession, though in

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their own avowed right as owners, was, nevertheless, not adverse in law for twenty years. The executor, Morrow, had no control over the Laurel land. The title and control were exclusively in the testator's descendants, either as his heirs or devisees, until the appointment of the personal representative in Kentucky. The executor, without power to sell, had no right to lease otherwise than as their agent or for their use, as the beneficial landlords; and the tenants were, in law, their tenants, and could not rightfully or availably attorn to any other claimant than the equitable or legal reversioner. Bright and Clark could not be considered such reversioner before the conveyance to them by Worthington, as Kentucky administrator *cum testamento*, and, consequently, until that time, their possession was not adverse, but inured to the benefit of the appellants, and cuts off the statute of limitations.

The executory contract of sale was void for want of any authority in Worthington, as mere administrator *de bonis non* in Virginia, to sell or otherwise interfere with the land in Kentucky; and as a void sale could not be confirmed, the conveyance was the first and only valid sale, and not only the possession, but the adequacy of the consideration, must be tested by that, as the only contract of sale which passed any right, or can be judicially recognized for any purpose.

5. The only remaining question is, whether that only sale should be upheld, or should be canceled on the pleadings and evidence in this case? And, after what has been already said, the solution of that question depends on two subordinate questions: 1st, whether the existence of unpaid debts made the sale necessary; and 2d, whether, if not necessary, the purchasers had notice, either actual or constructive, of that fact?

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The settlements in Virginia, as certified, are *prima facie* evidence that, as late as the year 1822, the testator's estate was indebted to Morrow, as executor, about nine thousand dollars, for advances to that amount beyond the legal assets; and by substitution, his representatives stood in the shoes of the creditors whom he thus satisfied with his own funds; and if that balance remained unpaid in 1847, Worthington had a legal right to sell and convey the Laurel land. But on that subject, there being no other evidence, we must be governed by presumptions of fact and of law.

Forty years elapsed from the probate of the will to the date of the conveyance. The testator owned at his death a large and valuable homestead tract of land, and probably other real estate in Virginia. This was all subject to sale for the balance due to Morrow. His administrator, who ascertained that balance by the final settlement of 1822, must be presumed to have been anxious to collect it, and to have known the means of collection in Virginia. Eleven years elapsed from that settlement to the substitution of W. C. Worthington as the administrator *de bonis non*, with the will annexed. Four years elapsed from the date of that appointment to the date of his unauthorized and void sale to Clark and Bright; and ten years elapsed from that executory sale to the date of the conveyance. Of this long and pregnant delay no explanation has been attempted. Neither Morrow's administrator nor the superseded administrator *cum testamento*, have been made parties or been called to testify; nor has it been even intimated why, having urgently finished the settlement for the purpose of promptly coercing payment, which was their duty, they treacherously slumbered until this day, and have not been shown to have ever complained or even demanded payment of Worthington. These

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facts, unopposed and unexplained, conduce to a violent, if not conclusive, presumption of law, as well as of fact, that when Worthington abortively sold to Clark and Bright in 1837, and more especially when he conveyed to them in 1847, there was no unsatisfied debt or legacy requiring or authorizing the sale; and the legal conclusion is, that the sale and conveyance were void, unless the purchase was made in good faith, without constructive notice of that want of authority.

When a will directs the sale of real estate, if necessary, for the payment of all the testator's debts or legacies, a purchaser at any such sale, not being presumed to know, or to be able, by reasonable diligence, to know the condition of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale, and consequent want of authority to make it. If this were not so, prudent men would not bid a fair price at such sales. Policy and justice, therefore, have established the rule, as recognized by abundant authority in both Virginia and Kentucky.

The appellees invoke the application of this rule to their conveyance in this case; but we feel impelled to the conclusion that a court of conscience should not heed the invocation.

The purchasers saw, or should be presumed to have seen, the will, and saw that the testator's estate, both personal and real, was large; they knew that a long time had elapsed from the testator's death, and, therefore, as proved by the cautionary provision in their executory contract, they had reason to apprehend that neither unpaid debts nor legacies required the sale of the Laurel land; and when they made the contract of 1847, and

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took the conveyance, they *must* be presumed to have known all the facts which we know on this subject. Moreover, the consideration they agreed to give was less than one dollar an acre, and not more than half the estimated value at that time; and in 1847 they obtained the conveyance without any new or additional consideration, and then the land was worth at least twenty-five thousand dollars. As before adjudged, the last sale was the only one which Worthington had a semblance of power to make; and this being a matter of law, his vendees in 1837 are presumed to have known it. Under all these circumstances, and the only consideration being so glaringly inadequate, it seems to us that the circuit court ought to have canceled the sale and conveyance as unauthorized and constructively fraudulent.

But as there is no sufficient evidence of actual fraud, and the vendees paid to Worthington as administrator about two thousand dollars, which he may be presumed to have applied to the use of the appellants, or may be compelled to do so, equity seems to require that the appellees should be reimbursed, and should hold a lien on the land to secure restitution of the amount paid and legal interest thereon, after deducting a reasonable amount for rents and ameliorations during their occupancy of the land; and on these terms, when adjusted, restitution of possession should be decreed to the appellants, together with their costs.

In the present phase of the case, such would be the judgment of this court, and a conformable mandate would allow no further preparation on the question of an indebtedness authorizing the sale and conveyance in 1847; but as that question seems to have been comparatively overlooked or neglected, and possible injustice may be done to innocent occupants, who were not parties, we

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have concluded, at the urgent appeal of counsel, to exercise a liberal discretion, and give leave, on the return of the cause, to take, without avoidable delay, testimony on that subject, if either party may choose to do so.

Wherefore, the judgment is reversed, and the cause remanded, for further proceedings and final decree consistent with the principles of the foregoing opinion.

CASE 9—PETITION EQUITY—SEPTEMBER 25.

Watson vs. Robertson.

APPEAL FROM HENDERSON CIRCUIT COURT.

1. In payment for the wife's lot, sold and conveyed by the husband and wife, the purchaser assigned to her a note for eight hundred and fifty dollars. The husband afterwards, without objection on her part, appropriated the proceeds of the note to the improvement of a lot for which he held the title bond of his vendor. *This was such a conversion and possession of the proceeds of the wife's property as to vest it absolutely in the husband*, and render it liable for his debts, even in opposition to his wife's claims for an equitable provision for herself and children.

2. If the wife have a *chose in action* or a right to property not reduced to possession, and which cannot be reached by a creditor of the husband without the aid of a court of equity, the chancellor will not subject it to the debt of the creditor in opposition to the wife's claim to have a suitable provision made for herself and children; yet, when it has been so reduced to possession, or converted by the husband to his use, and especially where this is done without any intention of making the wife her husband's creditor, or otherwise preserving her individual rights, the court will not interpose to provide for her to the exclusion of the claim of creditors. (*Whitesides vs. Dorris and wife*, 7 *Dana*, 108; *Martin vs. Trigg, &c.*, 8 *B. Mon.*, 529; *Latimer vs. Glenn*, 2 *Bush*, 543.)

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H. & M. YEAMAN, For Appellant,

CITED—

7 *Dana*, 108; *Whitesides vs. Dorris and wife.*

8 *B. Mon.*, 529; *Martin vs. Trigg.*

14 *B. Mon.*, 260; *Moore vs. Moore.*

2 *Duvall*, 121; *Sims vs. Spalding.*

4 *Metcalfe*, 84; *Maraman vs. Maraman.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

E. D. McBride and John McBride sold to Jesse Robertson a lot of ground in the city of Henderson, at the price of six hundred dollars, payable in three equal annual installments, and executed their bond to Robertson for title. Afterwards said John McBride, being the owner of the notes on Robertson for the purchase money, brought a suit to enforce the vendor's lien on the lot for their payment; and the appellant, Watson, also brought a suit in equity, setting up two judgments against Robertson on which executions had been returned "no property found," and seeking to subject the lot first to the payment of McBride's debts, and then to the satisfaction of his own claims.

The two suits were consolidated; and afterwards Mrs. Martha S. Robertson, the wife of said Jesse Robertson, was, on her petition, made a party, and set up, in opposition to the relief sought by Watson, that she, being the owner of certain real estate, sold it to J. C. Walker for eight hundred and fifty dollars, which he paid by transferring to her a note of that amount on Tandy Sandifer; and that she afterwards expended the proceeds of the note in building a house on the lot. She further alleged that her husband was improvident and insolvent, and that she owned no other estate than the interest claimed by her in said property, and prayed the court to settle the value of the house to her separate use, to the exclusion of her husband and his creditors.

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The court adjudged a sale of the property, and that its proceeds be first applied to the payment of McBride's debts and certain other charges on the property; but as between Watson and Mrs. Robertson, the claim of the latter was preferred and sustained, and from that judgment Watson prosecutes this appeal.

It sufficiently appears from the evidence, that, after the transfer of the note on Sandifer, said Jesse Robertson, with his wife's consent, agreed with Sandifer that he might discharge his note by the purchase of building materials and the payment of the wages of workmen in building the house, and that Sandifer did so.

It is settled, we think, in accordance with principle and authority, that although, if the wife have a *chose in action* or a right to property not reduced to possession, and which cannot be reached by a creditor of the husband without the aid of a court of equity, the chancellor will not subject it to the debt of the creditor in opposition to the wife's claim to have a suitable provision made for herself and children; yet, when it has been so reduced to possession, or converted by the husband to his use, and especially where this is done without any intention of making the wife her husband's creditor, or otherwise preserving her individual rights, the court will not interpose to provide for her to the exclusion of the claim of the creditor. (*Whitesides vs. Dorris and wife*, 7 *Dana*, 108; *Martin vs. Trigg, &c.*, 8 *B. Monroe*, 529; *Latimer vs. Glenn*, 2 *Bush*, 543.)

The property for which the note on Sandifer was assigned appears to have been conveyed to Walker by Mrs. Robertson, in conjunction with her husband, who afterwards, without objection on her part, appropriated its proceeds to the improvement of the lot in controversy, for which he held the bond of the McBrides; and this we regard as such a conversion and possession of the proceeds

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of the wife's property, as to vest it absolutely in the husband and render it liable to his debts, even in opposition to his wife's claim for an equitable provision for herself and children.

This case differs from that of *Sims vs. Spalding* (2 *Duvall*, 121), to which our attention has been drawn, where the estate of the wife in the hands of her father's executor was, without her consent, and without having been actually received by the husband, appropriated to the purchase of land which had not been conveyed to him; and the court held that the conversion of the wife's estate was "still *in transitu*," the initial investment of the husband not having been perfected by a legal title, and the aid of a court of equity being required to subject the husband's interest to his debts.

Wherefore, the judgment in favor of Mrs. Robertson is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 10—PETITION ORDINARY—SEPTEMBER 26.

Alfriend, &c., vs. Hughes.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. Money advanced or loaned, to be bet or wagered on a horse race, cannot be recovered. The Revised Statutes provide that all such contracts and considerations "*shall be void.*" (*Rev. Stat., chap.* 42, *sec.* 1.)
2. Under the general issue, the circuit court properly allowed and considered the special finding of the jury, to the effect that the action was based upon a gambling transaction.
3. The plaintiff is entitled to notice of every defense intended to be relied on, consisting of "new matter constituting a defense," by a statement of such matter in the answer. This rule does not apply to a case like this, in which, from the plaintiff's own proof of the contract he seeks

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to enforce, the contract is shown to be, according to express law, absolutely void.

W. R. THOMPSON, For Appellants,

CITED—

3 *Met.*, 434; *Denton vs. Logan.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The appellants brought this action for the recovery of four hundred and two dollars, which they alleged the appellee was indebted to them "for money paid, advanced, and loaned" to him by them in October, 1866, and which he had since that time promised to pay them.

The defendant, by his answer, denied the material allegations of the petition, but did not allege any new or special matter of defense.

A trial of the case resulted in a special verdict, which is as follows: "We of the jury find that the money sued for was advanced by the plaintiffs for the defendant to pay 'a pool' bought by the latter on the Greenland race-course; that the plaintiffs were pool-sellers; and that the advance was made for the purpose of paying money lost in that pool on a horse race, and was made by the plaintiffs with a knowledge, both before the wager and afterwards, that it was for the purpose aforesaid; that the plaintiffs were stake-holders, and received a commission for their services as pool-sellers."

Upon the verdict so rendered the court gave judgment for the defendant, and a motion for a new trial having been overruled, the plaintiffs have appealed to this court.

The evidence is not certified in the record, and the correctness of the judgment must be tested by the pleadings and special finding of the jury.

It is insisted for the appellants—1st. That the transaction was not within the prohibition of the statute against gaming; and 2d. That, under the general issue, the court

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could not consider the special facts on which the judgment is based, as they were not pleaded in avoidance of the action. Neither of these positions can, in our opinion, be maintained.

The 1st section of chapter 42 of the Revised Statutes declares: "That every contract, conveyance, transfer, or assurance for the consideration, in whole or in part, of money, property, or other thing won, lost, or bet at any game, sport, pastime, or wager, or for the consideration of money, property, or other thing lent or advanced, for the purpose of gaming or wagering, to a person then actually engaged in betting, gaming, or wagering, shall be void."

It conclusively appears from the verdict of the jury that the money lent or advanced by the appellants, and which was the foundation of their claim, was so furnished to the appellce, to be then wagered and bet by him upon the result of a horse race, a description of betting or wagering clearly embraced by the statute, and in which he was at the time actually engaged.

As to the second ground of objection taken for the appellant, it seems to us that, although it has been correctly held by this court, in *Denton vs. Logan* (3 *Mct.*, 434), and in other cases, that under the present system of practice, as regulated by the Code, the plaintiff is entitled to notice of every defense intended to be relied on, consisting of "new matter constituting a defense," by a statement of such matter in the answer. This rule does not apply to a case like this, in which, from the plaintiff's own proof of the contract he seeks to enforce, the contract is shown to be, according to express law, absolutely void.

Wherefore, as it seems to us the judgment was authorized by the special verdict of the jury, the same is affirmed.

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CASE 11—PETITION EQUITY—SEPTEMBER 26.

Belknap vs. Martin.

APPEAL FROM LOUISVILLE CHANCERY COURT.

Husband and wife conveyed real estate to a trustee with power to sell, to secure a debt, due by the husband to the wife, and to hold the proceeds of the sale for the separate use of the wife. A conveyance of such real estate by the trustee, in which the husband and wife joined, passed to the purchaser an indisputable title. (*Revised Statutes*, 2 *Stanton*, 32.)

BARR & GOODLOE, For Appellant,

CITED—

Revised Statutes, *sec.* 17, *chap.* 47.

17 *B. Mon.*, 55; *Stuart vs. Wilder.*

BULLITT & SPEED, For Appellee,

CITED—

17 *B. Mon.*, 549; *Lyons vs. Fields.*

Revised Statutes, *sec.* 24, *chap.* 80.

1 *Wheaton*, 303; *Story's Equity*, *sec.* 1065.

2 *Wash. on Real Prop.*, 320; 1 *Wood Conv.*, 498, *note.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The deed from C. Bullitt and wife to Wilson, of the 19th of February, 1852, did not in terms nor in meaning create a separate estate in Mrs. Bullitt in the property conveyed; but it was an assignment of the estate to Wilson in trust to secure the residue of the debt which Bullitt owed his wife, after the estate in Louisiana, on which she had a claim, should be exhausted, with the power of sale in Wilson; and the *proceeds* were to be held by him

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for the separate use of the wife, after he executed the power to sell conferred on him.

It was first necessary to effect a sale of the real estate to realize the balance that remained unpaid to Mrs. Bullitt, after the disposition of the Louisiana property, to raise the fund which was to constitute the separate estate provided for, and to be held by Wilson in trust for her use.

But even if the deed can be construed as creating a separate estate in the property conveyed to the use of Mrs. Bullitt, it confers a power to sell on Wilson; and under the *act* approved 16*th February*, 1858, which amends *section* 17, *article* 4, *chapter* 47, *Revised Statutes*, he may alienate the estate. (*See* 2*d vol. R. S., p.* 32.)

In the deed from Wilson, the trustee, to Martin, appellant's vendor, Bullitt, the maker of the deed to Wilson and his wife, both joined, whereby an indisputable title passed to Martin to the estate sold by him to appellant, and there is no complaint of the title in other respects. (*See* 24*th sec., chap.* 80, *R. S.*, 2*d vol., p.* 230.)

We concur, therefore, in opinion with the court below.

Wherefore, the judgment is affirmed.

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CASE 12—PETITION ORDINARY—SEPTEMBER 26.

Duncan vs. Headley.

APPEAL FROM MERCER CIRCUIT COURT.

If there be a cause of attachment *against one co-defendant*, under section 221 of the Civil Code, *save for non-residency*, an attachment is allowed against the other defendants. The court refused to overrule *Mills vs. Brown, &c.*, 2 *Met.*, 405.

JAMES SIMPSON, For Appellant,

CITED—

Civil Code, sec. 221, *and amendment of* 1856.

2 *Met.*, 405; *Mills vs. Brown, &c.*

JAMES B. BECK, For Appellee,

CITED—

2 *Met.*, 405; *Mills vs. Brown, &c.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The sole question in this case is, whether, if there be a cause of attachment against one co-defendant, under section 221, Civil Code, save for non-residency, an attachment by reason thereof should be allowed against the others, and we are asked to reverse and overrule the case of *Mills vs. Brown, &c.* (2 *Met.*, 405.) That decision was rendered in the year 1859, and the Code, as then construed, has been permitted to stand without amendment, whatever might be said as to the then construction of this section, were it an original question; yet, after it has been acquiesced in for nine years, without legislative interposition, we are disinclined to overrule it.

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All that can be said of that decision is, that this section of the Code is rather ambiguous, and either construction insisted on by the parties is not free from doubt.

Wherefore, the judgment is affirmed without damages, no supersedeas appearing.

CASE 13– PETITION ORDINARY—SEPTEMBER 29.

Detherage vs. Montgomery.

APPEAL FROM SHELBY CIRCUIT COURT.

Motion for a new trial in the circuit court is essential in an action wherein the issue presented by the pleadings was submitted to a jury. The failure to make such motion precludes the appellant from the opportunity of having the errors complained of corrected in the Court of Appeals. (*Humphreys vs. Walton*, 2 *Bush*, 580.)

J. W. MIDDLETON and
J. L. CALDWELL, For Appellant,

CITED—

1 *Greenleaf on Evidence*, *secs.* 390, 394, 397.
2 *Met.*, 613; *Millet vs. Parker.*

BULLOCK & DAVIS, For Appellee.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The issue presented by the pleadings was submitted to a jury, and after the rendition of a verdict, and judgment thereon, no motion was made for a *new trial*, but an appeal by the defendant below was prayed to this court, and time obtained to make out and have allowed a bill of exceptions.

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In *Humphreys vs. Walton*, 2 *Bush*, 580, this court said: "On an issue, and trial of a fact by a jury, a motion for a new trial is essential to correct the errors growing out of the evidence or instructions, before an appeal can be entertained by this court."

The failure, therefore, of appellant to move for a new trial in the court below, to have the errors complained of corrected, precludes him from the opportunity of having them corrected here.

Wherefore, the judgment must be affirmed.

CASE 14—PETITION ORDINARY—SEPTEMBER 30.

Brown, Bro. & Co. vs. Martin & Co.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

The right of exemption of a homestead under the act of February 10, 1866 (*Myers' Supplement*, 714), depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted, as a home for himself and family, and *that right does not exist* where the residence of the debtor and his family is permanently located elsewhere.

W. T. WARD, For Appellants,

CITED—

Act of February 10, 1866, *Myers' Sup.*, 714, 715, 716.

BODLEY & SIMRALL, For Appellees,

CITED—

Act of February 10, 1866, *Myers' Sup.*, 714.

Constitution of Kentucky, sec. 37, *art.* 2.

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Law Dictionary and Webster—"*Homestead.*"
2 *Met.*, 45.
Const. of Texas, sec. 2; *Hartley's Digest*—"*Homestead.*"
Revised Statutes of Texas, article 1230.
23 *Texas*, 498; *Phillis vs. Smally.*
Sec. 1, *Act of March* 23, 1850, *Ohio Statutes.*
15 *Ohio Reports*, 280; *Colwell vs. Carper.*
6 *Cal.*, 235; *Holden vs. Pinney.*
34 *N. H.*, 392; *Norris vs. Moutten.*
15 *Texas*, 518; *Meyer vs. Claus.*
2 *Mich.*, 472; *Wisner vs. Farnham.*
10 *Iowa*, 51; *Williams vs. Swertard*
3 *Vermont*, 678; *Davis vs. Andrews.*
4 *Cal.*, 26; *Cook vs. McChristian.*
21 *Ia.*, 40; *Kitchlett vs. Bergrim.*
21 *Ills.*, 178; *Waters vs. People.*
5 *Cal.*, 244; *Wolf vs. Flieschaker.*
6 *Cal.*, 165; *Reynolds vs. Pixters.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The appellees having recovered a judgment against Joshua R. Brown, Walter N. Brown, and Samuel L. Lee, who composed the firm of Brown, Brother & Co., for the sum of two thousand six hundred and fifty-four dollars and eighty-five cents, an execution issued thereon, was levied on an undivided interest of said Lee in a house and lot on Green street, in the city of Louisville, which interest, after advertisement and valuation, was sold by the sheriff, and purchased by the plaintiffs in the execution for three hundred dollars.

Afterwards, the appellants moved the court to set aside the sale on the ground that said interest in the property was exempt from sale under the act of February 10th,

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1866, "to exempt homesteads from sale for debt" (*Myers' Supplement*, 714); and the court having heard and overruled the motion, the appellants seek a reversal of that judgment in this court.

The interest of S. L. Lee in the property which was sold was not more than an undivided fourth, if so much, and that under the will of Silas Lee, deceased, was vested in S. L. Lee in remainder, subject to a particular estate in the testator's widow. And although S. L. Lee was an "actual *bona fide* housekeeper, with a family," as required by the sixth section of the homestead act, he does not appear to have occupied the property, or intended to make it his actual place of residence; but, on the contrary, he lived and kept house in a different part of the city, and had done so for years before. It does appear, however, that he did not own the property occupied by him, or any other real estate, except that which is in controversy in this case.

The first section of the homestead act provides: "That, in addition to the personal property now exempt from execution on all debts or liabilities created or incurred after the first day of June, one thousand eight hundred and sixty-six, there shall be exempt from sale under execution, attachment, or judgment of any court, except to foreclose a mortgage given by the owner of the homestead, or for purchase money due therefor, so much land, including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars."

In the succeeding sections of the act the manner of valuation and sale is prescribed: and where the value of the real estate levied on exceeds the debt, the defendant is allowed to select the part to be set apart as his

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homestead; and the fourth section provides, that in certain cases, where the property is not susceptible of a division without great diminution of its value, and its entire value exceeds one thousand dollars, it shall be sold, "and one thousand dollars of the money arising from the sale shall be paid to the defendant to enable him to purchase another homestead."

Whether the provisions of the statute for the benefit of the debtor and his family are sufficiently broad and comprehensive to include and establish a homestead right in real property, in which the head of the family is the owner of an undivided share as a tenant in common with others, need not be decided in this case; nor is it necessary to decide whether a habitable tenement on the premises is, in all cases, requisite to the existence of a homestead right; for, in another aspect of the case, a question is presented as to the construction of the statute, the solution of which will determine the correctness of the judgment in this case.

Does the exemption provided by the statute extend to and embrace a case like this, where the debtor neither had his home upon the premises, nor, at the time of the levy and sale, had treated the property as his place of residence, or by any consistent acts, or otherwise, had manifested an intention to actually use the property as a home for himself and family? We think not.

According to our interpretation of the statute, the right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and that the right does not exist where the residence of the debtor and his family is permanently located elsewhere.

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This conclusion is fortified by the adjudications of the courts of other States in the construction of homestead laws, to which we have been referred.

It seems to us, therefore, that the court rightly overruled the motion to set aside the sale.

Wherefore, the judgment is affirmed.

CASE—15—PETITION EQUITY—SEPTEMBER 30.

Dannelli, &c., vs. Dannelli's adm'r.

4bu 51
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116 70
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118 443
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129 730

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. A marriage, valid in the country where celebrated, is held to be valid in other countries where the parties may be domiciled, though it would have been invalid, by the law of the subsequent domicil, if it had been originally celebrated there. Polygamous and incestuous marriages are exceptions to this rule.
2. As both reason and authority regard the assent of the parties and the consummation thereof, by cohabitation, as a legal and valid marriage, unless prohibited by the municipal laws of the country where celebrated; before the marriage of a man to his brother's widow in Switzerland would be pronounced invalid by the courts of Kentucky, the laws of Switzerland making it invalid, should be made known in a legal form.
3. A valid marriage puts an end to illicit intercourse (23 *New York Reports*, 95), and rebuts the presumption of continuous illicit conduct arising from previous illicit cohabitation.
4. The declaration of parties, if deceased, that they were married, provided they were made *ante litem motam*, are admissible of the fact declared. Such declarations made by parents in life are admissible as evidence to establish the legitimacy of their issue. (*Goodnight vs. Moss*, *Cowp.*, 591, *and cases cited.*)

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5. The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, courts are bound to assume it to be moral rather than immoral, and credit is given to the assertion of parties, whether express or implied, of a fact peculiarly within their own knowledge.
6. The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy, and in the absence of evidence to the contrary, a child *eo nomine* is therefore legitimate. (2 *Hogg C. R.*, 197; 4 *Eng. Eccl. R.*; 13 *Ves.*, 145; 23 *N. Y.*, 107.)
7. The presumption of legitimacy is not lightly repelled by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory, and conclusive.
8. By the laws of Kentucky actual marriage and subsequent recognition would legitimate a child born before the marriage.
9. The laws of the place where the will is made, and the testator is domiciled, *must determine who are capable* of taking under the will, and in the ascertainment of the persons *who are to take* under the will. (*Story's Conflict of Laws, secs.* 479, *a–d–e.*)
10. The general rule is, that the will is to be construed according to the law of the place of the testator's domicil in which it is made.

BULLOCK & ANDERSON,
BODLEY & SIMRALL, and
J. G. WILSON and WM. N. SWEENEY, For Appellants,

CITED—

2 *Jarman on Wills*, 70, 140, 71, 156, 132.
2 *Redf. on Wills*, 336.
2 *Will. Ex'rs*, 989, 1001–2, 993–7, 1004–5.
15 *Ves.*, 92; 5 *Ves.*, 548.
2 *Dow. P. C.*, 482; 4 *Comst.*, 236, 238.
7 *B. Mon.*, 130; *Kuhl vs. Kauer.*
5 *J. J. M.*, 475; *Snead vs. Ewing.*
Story's Conflict of Laws, sec. 93, *s, t, w*, 114–16, 16 *a*, 105 *a*; *Phillips on Ev.*, p. 493.
2 *Greenleaf on Ev.*, 3 *ed.*, *chap.* 3, *part* 2, *4th ed.*, *p.* 95.
3 *Marshall*, 369–73; *Dumarsly vs. Fishly.*

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3 *Mar.*, 327; 4 *Mon.*, 367; 5 *J. J. M.*, 148.
Revised Statutes, 2 *Stanton*, *pp.* 1, 2.

ALBERT S. WILLIS and
B. TWYMAN, For Appellees,

CITED—

Burge, Comm. on Col. and For. Law.
Jarman on Wills; Williams on Executors.
Redfield on Wills; Roper on Legacies.
Story's Conflict of Laws; Greenleaf on Evidence.
Revised Statutes, chap. 30, *sec.* 6, *etc.*
Phillips's Evidence; Powell on Devises, 282*n*, *et seq.*
Wigram on Wills; Briggs vs. Shaw, 9 *Allen*, 516.
Wheeler vs. Dunlap, 13 *B. M.*, 292.
Allan and wife vs. Vanmeter's Devisees, 1 *Met.*, 276.
Skeen, etc., vs. Fishback, 1 *Mar.*, 357.
Trotter vs. Trotter, 4 *Bligh N. S.*, 502.
Gordon, etc., vs. Brown, 5 *Eng. Eccl. Rep.*, 178.
Anstruther vs. Chalmer, 2 *Simons*, 1.
Boyes vs. Bedale, 9 *Jur. N. S.*, 196.
Burtwhistle vs. Vardill, 5 *Barn. and Cress.*, 438.
Harrison, etc., vs. Nixon, 9 *Peters*, 505.
Sneed vs. Ewing and wife, 5 *J. J. Mar.*, 476.
Stevenson vs. Gray, 17 *B. M.*, 193.
Jackson's ad. vs. Moore and wife, 8 *Dana*, 171.
Birney vs. Hann, 3 *Mar.*, 320.
Whitlock vs. Baker, 13 *Ves.*, 514.
Arayo vs. Currill, 1 *Louis*, 541.
Crosby vs. Huston, 1 *Texas Rep.*, 231.
Catterall vs. Catterall, 11 *Jurist*, 914.
Ward vs. Dey, 1 *Roberts*, 759.
Piers vs. Piers, 2 *H. L. Cases*, 331.
Standen vs. Standen, Peake, 32.
Dumarsly vs. Fishly, 3 *Mar.*, 370.

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Wilkinson vs. Adam, 1 *Vesey and B.*, 467.
Metham vs. Duke of Devon, 1 *P. Williams*, 529.
Beachcroft vs. Beachcroft, 1 *Madd.*, 430.
Gill vs. Shelley, cited in Wigram, *sec.* 55.
Lord Woodhouselee vs. Dalrymple, 2 *Mer.*, 419.
Steele, etc., vs. Price and wife, 5 *B. M.*, 69.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The testator, Paul Dannelli, was a native Italian, but naturalized citizen of the United States, who died a resident of Louisville, Kentucky, in the year 1865, having published his last will in the year 1856, just before his departure to visit Italy, by the fifth item of which he devised "the balance of my estate, real, personal, and mixed, exclusive of that herein devised and given to, or in trust for, my said wife, I give and devise unto my two brothers, Giacomo and Alexander, and my sister, Mary Marchand, to be equally divided between them; *but should either of my brothers or sister die before me, then, and in that case, the children or heirs of such deceased brother or sister shall be entitled to that portion of my estate which their father or mother would have been in case he or she had survived me.*"

The testator left a wife, but no children. His brother Alexander and sister Mary were residents of Kentucky, and his brother Giacomo, or James, resided in Milan, in the Province of Lombardy, then of Austria, now of Italy.

The testator left a large real and personal estate, and Aurelia Annunciata Agrani Luchina, wife of Casino Luchina, claiming to be the child and heir of James Dannelli, asserts right to one third of the residual estate, which is resisted by Alexander Dannelli and Mary Marchand, who deny her legitimacy, or that she is at all the child of James Dannelli.

The evidence may be regarded as establishing the following facts, to-wit: That Aurelia's mother was the

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widow of a deceased brother, John Dannelli, who died in the year 1813; that she was born October 21, 1825, in Milan, and the next day placed on the wheel of "The Pious Institution of the Exposed to the Wheel in St. Catharine," an institution to prevent "infanticide," and where newly-born infants can be placed on a wheel which, by a horizontal rotary movement, carries the babe into the house without the exposure of the inmates to the person so placing the infant, or the latter to the inmates.

That those who wish at some future time to reclaim the infant, can have it identified by placing a mark on it, or depositing with it some writing or trinket. That with this infant there were placed means of identification; that some three years afterward James Dannelli reclaimed the infant and took her over to the Province of Noviano, near Lake Como, some thirty miles from Milan, where the mother's people resided; but with whom he placed her does not appear; that in the year 1827 he took Jane Dannelli, the mother, to some town in Switzerland and there married her, and they then lived as husband and wife, so recognized by their intimate neighbors and associates.

Mrs. Jane Dannelli, who was seventy-two years old when she gave her deposition, says Aurelia was permitted to remain in Noviano until 1849; she would then be about twenty-four years old. The weight of the evidence, however, renders it probable that Jane was mistaken as to this, and that she was taken home by James Dannelli when she was some fourteen years of age, which would make it about 1839. This, however, is not very important.

The reason assigned for the marriage in Switzerland was, because the canonical law of Lombardy, then a

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Province of Austria, forbade the marriage with a deceased brother's widow without a dispensation from the proper church authorities, which neither James nor Jane were able to purchase.

That, in the latter part of 1856, Paul Dannelli and his wife visited and remained in Milan some twenty-one months; were in daily intercourse with James and Jane and Aurelia; went walking with them; took Aurelia to the theatre; gave her presents in money and dressing; seemed proud of her; recognized Jane as the wife and Aurelia as the daughter of James. He then expressed a desire that she should be better educated, so as to write to him; expressed an anxiety that his brother should, by proper proceedings, adopt her as his daughter, that she might be legitimate, and expressed this desire, as she might thereby be an heir to himself.

In his subsequent correspondence, after he left Milan for home, in his first letter written from Paris, France, he expressed to his brother his anxiety that Aurelia be adopted as his daughter; he recurred to this subject in his correspondence after arriving at home; directed that she should have twenty of the five hundred francs sent as a present to his brother; and on learning his brother's death before the arrival of the letter, directed that she should have it all. He corresponded with her after his brother's death in the latter part of 1859; sent her in one letter two hundred and twenty-three francs, at a time when he supposed he had lost his stock in the Louisville and Nashville Railroad, amounting to some eighty thousand francs, by its seizure and destruction by the Southern army; and to these he subscribed himself, "*I am your uncle;* " addressing her also as "*dearest Aurelia.*"

James, by a public act of record before a notary public, did adopt her as his daughter in September, 1859, but a

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short time before his death, and willed to her and her mother all his estate.

Upon these facts several important legal questions arise. Whether Paul Dannelli knew, before his visit to Milan, that his brother James and sister-in-law Jane were living together as man and wife, and had a child which they recognized, does not appear; but that he did recognize this relation as husband and wife, and regarded Aurelia as their child on his visit there, and subsequently, is made manifest.

James was then far advanced in life, being sixty-odd years of age, and had never been otherwise married.

By the Austrian Civil Code, no one who had legitimate children could adopt; but an act of adoption, when allowed, secured all the rights of a legitimate child as between the "adopted" and "adoptive."

By the Italian Civil Code, the adoption of an illegitimate child was forbidden; but not so by the Austrian Code, which must govern this case; for the Italian Code had no dominion over Lombardy until the year 1860.

It is insisted, that even if a marriage in Switzerland be established, yet, as the parties resided in Lombardy, the laws of the latter must govern as to legitimacy, and that they forbid it; and that if this be not so, still we cannot determine the laws of Switzerland, because not proved.

In *Stephenson vs Gray* (17 *B. M.*, 203), this court adjudicated a question of the marriage of citizens of Kentucky who went to Tennessee, celebrated the rites of matrimony, and returned to Kentucky; continued to live together as husband and wife for many years; had offspring; when the husband died. The wife, being the widow of the husband's deceased uncle, their marriage was interdicted by the Kentucky statute of 1798.

This court, in a labored opinion, held that the marriage, not being interdicted by the laws of Tennessee, was valid,

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and that they were lawful husband and wife wherever they traveled, though it might have been their intention immediately to return to Kentucky, and cites with approbation the decision of Lord Stowell, in *Dalrymple vs. Dalrymple* (2 *Hogg*, 6 *R.*, 54, 58), in which he held that Miss G.'s marriage must be tried by the laws of Scotland, where it occurred, he saying that the parties gained *a forum* in the place of marriage, and became entitled to the benefits of its laws.

This court also said, especially in Kentucky it is the settled law, that a marriage valid in the country where celebrated is to be held valid in other countries where the parties may be domiciled, though it would have been invalid by the law of the subsequent domicil if it had been originally celebrated there; but that cases of polygamous and incestuous marriages are exceptions, however. As to the latter class, the exceptions hold good only as to such as are manifestly contrary to the law of nature and subversive of the good order of society, and are alike condemned by the common sentiment of all civilized and Christian nations. As between lineal ascendants and descendants, this condemnation makes no discrimination founded on nearness or remoteness of degree; but as to collaterals, it goes no further than to prohibit marriage between brothers and sisters.

The British courts have departed from the general rule, that the *lex loci contractus* must govern the validity of foreign marriages to sustain such a marriage between British subjects, but never for the purpose of avoiding it.

The court regarded the general rule, both in England and America, as sustaining the validity of a marriage if legal at the place of celebration, although it would have been illegal if celebrated at home, and referred to. (*Bishop on Marriage and Divorce, secs.* 125, 126; 16 *Mass.*

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R., 157; 8 *Pick.*, 423; 1 *Pick.*, 506; *Bullen N. P.*, 114; *Story's Conflict of Laws, secs.* 123, 123*a*, *b*; 2 *Kent's Com.*, *sec.* 16.)

Mere canonical disabilities, growing out of relationship by marriage, rendered the marriage voidable, but not void; hence, as the court said, such marriages remained good until set aside by an ecclesiastic sentence, according to the English doctrine.

As both reason and authority regard the assent of parties, and the consummation thereof by cohabitation, as a legal valid marriage, unless prohibited by the municipal laws of the country where celebrated, before we could pronounce this marriage as invalid, the laws of Switzerland making it so would have to be made known to us in a legal manner.

This marriage put an end to the illicit intercourse, even if it be conceded that it had so been up to this period, as was decided by the appellate court of New York in *Caujolle vs. Ferrie* (23 *N. Y. R.*, 95), and rebutted the presumption of continued illicit conduct arising from the previous illicit cohabitation.

The declaration of parties, if deceased, that they were married, provided they were made *ante litem motam*, are admissible evidence of the fact declared. Such declarations, made by the parents in life, are admissible as evidence to establish the legitimacy of their issue. (*Goodright vs. Moss*, *Cowp.*, 591, *and cases cited.*)

The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, *we are bound to assume it to be moral rather than immoral,* and credit is to be given to their own asser-

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tion, whether express or implied, of a fact peculiarly within their own knowledge. (*Hubback on Successions*, 248; *Rex vs. Stockland*, *Burr's S. C.*, 508; 1 *W. Bl.*, 367; *Revel vs. Fox*, 2 *Ves., sr.*, 270; *Hervey vs. Hervey*, 2 *W. Bl.*, 877; 23 *N. Y.*, 104.)

The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and in the absence of evidence to the contrary, a child *eo nomine* is therefore legitimate. (2 *Hogg C. R.*, 197; 4 *Eng. Eccl. R.*; 13 *Ves.*, 145; 23 *N. Y.*, 107.)

In *Vowls vs. Young* Lord Chancellor Erskine said, as to proof of actual marriage, that the evidence, especially in cases of obscure families, must be very slight, and *Starr vs. Peck*, 1 *Hill*, sustains the same rule.

And the presumption of law is not lightly to be repelled; it is not to be broken in upon or shaken by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory, and conclusive. (Lord Lyndhurst, in *Morris vs. Davis*, 5 *Cla. & Fin.*, 163; also *Piers vs. Piers*, 2 *H.*, *of Lord's Cases*, 331; 23 *N. Y.*, 109.) The presumption arising from the conduct of the parents, from the continued recognition of her as their child, at least from the year 1849, the actual proof of the Switzerland marriage, is not rebutted by the necessary statement of James Dannelli, in the document of adoption, that Aurelia was of unknown parentage, especially as he therein says he has borne her affection from infancy; and when these statements were necessary to accomplish the desired object on his part, and the cherished object on the part of his brother Paul, and stronger still, as he told the notary public that she was his daughter and explained his object.

The language of this adoptive document, together with his will, are all accounted for by reason of the non-

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recognition of this marriage by the canonical law of Lombardy. By the laws of Kentucky, this actual marriage and subsequent recognition alone would legitimatize Aurelia; but when the parents lived together as husband and wife over thirty years, recognizing her as their child, and then James taking measures to make her a legitimate heir and adopted daughter, at the earnest solicitation of the testator, Paul, who also recognized the relation of husband and wife between these parents, and recognized and accepted her as his niece, how infinitely stronger becomes the moral as well as legal aspect of her cause.

As by the laws of Kentucky she must be regarded as legitimate, even if it were certain beyond a doubt that she would not be so regarded in Lombardy, we are not bound, by mere comity, to administer the canonical laws of the hierarchy of that country, so flagrantly repugnant to the genius of our American institutions and the laws and polity of our own State.

Story, in his "Conflict of Laws" (*section* 479*a*), says as to wills: "The general rule of the common law is, that it is to be construed according to the law of the place of his domicil in which it is made."

And again (*section* 479*c*), he says: "The same rule applies to the ascertainment of the persons who are to take under a will or testament; when it is made by the *words designating a particular class* or *description of persons, who are the proper persons to take* under the *designatio personam* is a point *to be ascertained by the place where the will is made and the testator is domiciled.*" As, if a person domiciled in England should bequeath his personal estate to his heir-at-law, the eldest son would take; but if domiciled in some of the American States, all the living children, and those representing deceased children, would

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take; and if domiciled in Holland, he should bequeath to the "male children," and the question should arise whether descendants claiming through male children were entitled, this must be settled by the laws of Holland. And in *section* 479*h* Story says: "The same rules of construction will generally apply to wills and testaments of unmovable property, unless, indeed, it can be clearly gathered from the terms used in the will that the testator had in view the law of the place of the *situs*. * * * * So if a testator should devise his real property to his next of kin, who would be entitled, would depend upon the construction given to the words by the law of his domicil."

In this case, the law of both the testator's domicil and *situs* of real estate regard Aurelia as a legitimate child and heir of her father, James Dannelli.

Story shows the reasonableness of this rule of construction by supposing a testator had realty situated in three different countries, all differing as to the meaning of the term "children" or "heirs." Are the same words in the same instrument to have three distinct and different meanings attached, or shall the meaning attached by the laws of the domicil prevail? Would it not be reasonable to presume the testator knew the meaning attached by the laws where he resided, and used them in the same sense? For the same views, reference is made to 4 *Burge, Comm. on Col. and For. Law, pt.* 2, *ch.* 4, *sec.* 5, *p.* 169; 2 *do., pp.* 857–8; *Yates vs. Thompson*, 3 *Clarke & Finclc*, 544, 583, 589; *Trotter vs. Trotter*, 3 *Wills & Shaw*, 407; *S. C.*, 4 *Bligh's R.* (*N. S.*), 502, 505.

And, as Redfield on the Law of Wills (*chap.* 9, *sec.* 30*c*) says, "there is no better principle in regard to all rules of construction, whenever applied, than to use them as helps and assistants towards reaching the intent of the testator."

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Here the rules of construction and the facts all tend to establish the same thing, that Aurelia was regarded by the testator as the child and heir of his deceased brother James.

It is said, that when he made the will, however, it does not appear he knew of Aurelia; nor does it appear he was ignorant of her. She had then been living with her father at least seven years. The natural presumption is, he did have reasonable information and knowledge of his relatives. His affection and solicitude for James and his family certainly indicates anything but indifference. But that his knowledge was perfect as to Aurelia and her relations to her parents from his visit to Milan in the latter part of 1856, until his death in 1865, does abundantly appear; and though his brother James' death had been known to him for six years, he never altered his will devising James' part to his "children or heirs," in case he should die before testator. Had he not intended Aurelia to take, it would have been most reasonable, after James' death, he should have added a codicil, devising his whole estate to his surviving brother and sister.

The presumptions of our law, and the proven and presumed intention of the testator, perfectly harmonize. As our law presumes Aurelia to be the legitimate child of James Dannelli, and the facts tend strongly to establish that the testator so regarded her, and intended that she should take under his will as the child and heir of her deceased father, it is useless for us to investigate whether, as adopted child and legal heir of James Dannelli, she could take, had she not been of blood kin to testator or his brother James.

Wherefore, the judgment is affirmed.

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CASE 16—PETITION ORDINARY—OCTOBER 2.

Commonwealth for Tiffany vs. Hurt, &c.

APPEAL FROM ADAIR CIRCUIT COURT.

1. A sheriff is responsible, when he has an execution in his hands, whether the defendants had property sufficient to pay the whole debt or a part of it.
2. If there are more defendants in the prior executions than are in those subsequently delivered, it would be the duty of the sheriff to make all the debts, by collecting from the defendants who were not in some of the executions, if he could do so.
3. A sheriff is not responsible for failing to return an execution to the proper office, if he acts in obedience to the orders of the plaintiff; but it is incumbent on him to make out his defense by evidence. A letter of the execution plaintiff's attorney, when he is proven to be such, would be evidence for the sheriff, as an excuse for failing to return execution.
4. It is the duty of a sheriff, when he levies an execution, to state the facts on the writ and sign it.
5. If a sheriff levies an execution on property of the defendant, and afterwards permits him to remove or dispose of it in such way as to deprive plaintiff of his debt, the sheriff and his sureties are liable, although no levy was indorsed on the execution. In such case *proof aliunde* would be admissible.

JOHN S. VANWINKLE and
WINFRY & WINFRY, For Appellant,

CITED—

2 *Metcalfe*, 428–9; *Goodman vs. Rout.*
Revised Statutes, 1 *Stanton*, 493.

A. J. JAMES, and
GARNETT & BAKER, For Appellees,

CITED—

1 *J. J. M.*, 551; *Bell vs. Commonwealth, &c.*
2 *Mar.*, 107; *Miller vs. Field.*
4 *J. J. M.*, 210; *Taylor vs. Bradley.*
3 *B. Mon.*, 328; *Bassett vs. Bowman.*

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JUDGE PETERS DELIVERED THE OPINION OF THE COURT.

The two main questions presented in this record are,

First. Did the court err in the instructions given at the instance of appellees?

Second. Was illegal and incompetent evidence permitted to go to the jury?

The first instruction was erroneous. It seems to make the sheriff's whole responsibility depend upon whether the defendants had property sufficient to pay the whole debt when he had the executions in his hands, and excludes from consideration the fact whether they had property enough to pay part of it at that time; and under that instruction, even if the jury should have believed that the defendants, when the executions, or any of them, were in the sheriff's hands, had estate sufficient to satisfy three fourths, or any part of the debt less than the whole, they must find for defendants, which is palpably erroneous.

As to the second instruction, as a proposition of law, it is true that executions being in full force which are first placed in the hands of the sheriff have priority over those against the same defendant or defendants subsequently delivered to him; but if there are more defendants in the prior executions than are in those subsequently delivered, it would be the duty of the sheriff to make all the debts by collecting from the defendants who were not in some of the executions, if he could do so.

The third instruction is rather an abstraction, without sufficient evidence to base it upon. The letter of Barrett is the only foundation for it, discovered in the record. That letter is dated March 22d, 1863, and necessarily referred to the execution of appellant then in the hands of the sheriff, bearing date the 3d of February, 1863, returnable to April rules of that year. The discretion granted

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to the sheriff by that letter related to the execution then in his hands, and cannot, by any rational construction, be understood to confer any discretion on the sheriff as to executions issued after the return day of the one then in the sheriff's hands, even if it had been shown that Barrett was appellant's attorney, and had authority to give the directions.

A sheriff is not responsible for failing to return an execution to the proper office if he acts in obedience to the orders of the plaintiff; but it is incumbent on him to make out his defense by evidence; hence, the fourth instruction would not be objectionable, if there had been sufficient evidence to authorize it.

The fifth instruction, to say the least of it, was misleading. It is the duty of the sheriff, when he levies an execution, to state the facts on the writ, and sign it; that is necessary as evidence of what he has done, and may be used against him; that may be the chief reason why he is required thus to proceed; but if a sheriff levies an execution on property of the defendant, and afterwards permits him to remove or dispose of it in such a way as to deprive the plaintiff of his debt, it would be strange indeed if the plaintiff could not make the sheriff and his sureties responsible for so gross a violation of his duty by proof *aliunde*, because he had failed to do his duty by indorsing the levy and signing it. Such cannot be the law.

By proving that Barrett was the attorney of appellant, his letter would be evidence for appellee as an excuse for failing to return the execution, dated February, 1863, and should be restricted by the proper instruction of the court to the transactions under that execution.

As to the proof of what R. W. McWhorter said to the sheriff at the time the receipts for the four hundred dol-

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lars and six hundred dollars were executed, that was a part of the *res gestæ*, and was competent.

But for the errors enumerated the judgment must be reversed, with directions to award appellant a new trial, and for further proceedings consistent herewith.

CASE 17—PETITION ORDINARY—OCTOBER 3.

Newman, &c., vs. Metcalfe County Court.

APPEAL FROM METCALFE CIRCUIT COURT.

Sureties in a sheriff's bond executed in 1865 for the collection of the county levy, &c., for that year, are not responsible for money then remaining in the sheriff's hands, which he had collected for county levies for previous years.

JOHN M. HARLAN and
JAMES HARLAN, JR., For Appellants.

A. J. JAMES,
JAMES GARNETT, and
——— DOHONEY, For Appellee,

CITED—

Revised Stat., secs. 1 *and* 6, *art.* 3, *chap.* 26, 1 *Stant.*, 300, 301.

Rev. Stat., sec. 3, *art.* 2, *chapter* 26, 1 *Stant.*, 297.

Myers' Supplement, p. 126.

18 *B. Mon.*, 621; *Todd vs. Caines.*

2 *Metcalfe*, 203–4; *Taylor vs. Nunn.*

13 *B. Mon.*, 306; *Stevenson vs. Huddleson.*

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JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This action was brought by appellee against the personal representative of George A. Clark, deceased, as late sheriff of Metcalfe county, and his sureties, on their bond, executed the 7th of June, 1865, in which the obligors jointly and severally bound themselves to the Commonwealth of Kentucky that said Clark, as sheriff of said county, should well and truly collect, account for, and pay over to the persons entitled to receive the same, according to law, the county levy and public dues of the county of Metcalfe for the year 1865, and when called upon by the county court, settle his accounts, and pay over the amount, if any, of public money in his hands belonging to said county; and that said Clark should, in all things, well and truly demean himself, and perform the duties of collector of the county levy of said county, &c., &c.

It appears that after the death of Clark, the sheriff, a commissioner was appointed by the county court to settle with his personal representative, who reported a balance of public money in the hands of said sheriff at the time of his death, or unaccounted for, of two thousand one hundred and eighty-two dollars and sixty-three cents due to the county; and to recover that sum this action was brought. On the trial of the cause, judgment was rendered against the defendants below for one thousand two hundred and eighty-two dollars and sixty-three cents, leaving nine hundred dollars of said claim for further litigation, and of that judgment appellants complain.

It appears, from the report of the commissioner, that, in making the settlement, he charged appellants with the sum of four thousand three hundred and four dollars and seventy-six cents, balance found to be due from Clark by a settlement made with him by Young in February, 1865,

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and also for the county levy for the year 1865, of three thousand two hundred and nineteen dollars and thirty-six cents, making the aggregate sum of seven thousand five hundred and twenty-three dollars and twelve cents, and credited the account by vouchers produced by appellants, so as to reduce the amount to said sum of two thousand one hundred and eighty-two dollars and sixty-three cents.

Whether or not this judgment can be approved, depends upon the true meaning and interpretation of the sheriff's bond, which is the foundation of this action.

The sheriff, by virtue of his office, was the collector of the county levy; and the law made it his duty, at the term of the court at which it was imposed, or at some subsequent term of the court, before he proceeded to collect the county levy, to execute a bond, with one or more good sureties, payable to the Commonwealth, whose aggregate estate, after the payment of all their liabilities, shall be equal to double the amount of the whole levy ordered to be collected. (*Sec.* 3, *art.* 2, *chap.* 26, 1*st vol. Rev. Stat.*, 297.) And then follows the form of the bond the collector is required to execute, which form is substantially pursued in the bond sued on.

The sheriff is required each year, before he proceeds to collect the county levy, to execute the bond prescribed, which is intended to secure to the county creditors and to the county the payment of the amount of the levy for that particular year. Such is the object and intention of the law.

Construing the bond sued on in the light of this law, and also according to the rational and common meaning of the terms of the bond itself, it must be evident, that in this action appellants are not responsible on the bond of

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1865 for money in the hands of Clark, collected for county levies for previous years.

Wherefore, the judgment is *reversed*, and the cause is remanded for a new trial, and for further proceedings not inconsistent with this opinion.

CASE 18—PETITIONS ORDINARY—OCTOBER 3.

Jarboe, Wm., &c., vs. Colvin, &c.

APPEALS FROM MARION CIRCUIT COURT.

1. Sundry attachment suits against the same defendant, on motion of the parties, without being consolidated, being heard and tried together by the court, the plaintiffs in some of the actions are competent witnesses for other plaintiffs. In a jury trial such evidence would, perhaps, be misleading, but not so on a trial by the court.
2. A witness having the same character of action against the same defendant, is not disqualified as a witness for the plaintiff; his similarity of interest would only go to the credibility of the witness.
3. A deposition being commenced in presence of both parties, too late in the day to be completed, the witness being called off the next day, the party taking on the first day notified the other party that on the next day he would take another deposition, so as to preserve the right to adjourn over to the third day to complete the first deposition. The deposition thus completed on the third day may be read as evidence.
4. A surety who is secured by mortgage on real estate has no right to sue out an attachment against his principal, without alleging the insufficiency of the mortgage; but being induced to sue out the attachment by the defendant, whilst other creditors might do so, the defendant himself cannot be heard to object and defeat such attachment for this cause.
5. The land purchased at the decretal sale having been conveyed to the purchaser, *the assignment of the certificate of purchase*, dated anterior

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to the conveyance to a third party, of itself is no evidence as to persons not parties to the assignment when assailed as fraudulent by creditors.

6. Recitals in deeds and writings are not evidence when assailed as fraudulent by creditors.

7. A mortgage upon the land and actual dwelling and home of the mortgagor, waives his right of exemption to a homestead, as provided in the act of February 16, 1866 (*Myers' Supplement*, 715), unless the land and homestead so mortgaged should sell so as to pay the mortgage debts, and still leave the homestead or its equivalent in money.

8. When the actual homestead is mortgaged and sold, the mortgagor is not entitled to a homestead in his other lands as against his then creditors.

9. In decretal sales of land the commissioner *must sell* in pursuance of the decree. He must also pursue the advertisement, whether the sale be *in gross or by parcels.* (*Hahn vs. Pindell*, 1 *Bush*, 540.) For any departure from the advertisement the sale should be set aside.

RUSSELL & AVRITT, For Appellants,

CITED—

2 *Met.*, 177; *Chenoweth vs. Fielding.*
3 *Met.*, 248; *Finnell vs. Cox.*
Civil Code, secs. 670, 728, 729, 259, 260, 145, 588.
1 *Met.*, 489; *Patterson vs. Caldwell.*
Revised Statutes, Myers' Supplement, p. 714.
MSS. Opn., June, 1858; *Moore's adm'r vs. Shepherd.*
4 *Dana*, 186; *Campbell vs. Johnson.*
MSS. Opn., December 8, 1866; *Abell vs. Park.*

W. B. HARRISON, For Appellees,

CITED—

2 *Met.*, 209, 211; *Schwein vs. Sims.*
Act of 1861, *sec.* 11, *Myers' Sup.*, 40.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Some twenty creditors of Wm. Jarboe sued out separate attachments against him, and these were heard together without an order of consolidation.

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Some of these plaintiffs were permitted to testify in behalf of others, and of this Jarboe complains.

By subdivision 6, section 670, Civil Code, only *parties to the* issue, or *parties interested in the issue*, are rendered incompetent; the rejection of some could only be erroneous as to the plaintiffs. These several plaintiffs were no parties to the issue as to the others, nor were they interested, as each must stand upon the evidence he produced, and his testimony could not be heard or considered in his own case. Had this been a jury trial, it would perhaps have been calculated to mislead and confuse the jury, but not so with the court; beside, the order shows that the hearing together was upon "the motion of the parties."

The similarity of interest could, at most, only go to the credibility of the witnesses.

When a deposition is begun in the presence of both parties, but too late in the day to get through, and the witness is necessarily called off the next day, and the party against whom it is to be used will not agree on a future time to finish it, and is then notified that some other deposition will be taken the following day, so as to preserve the right then to adjourn over to the next day, when the deposition of the first witness will be finished, the deposition should be read, and not quashed, for the reason that it was not continued on consecutive days; nothing in the Civil Code or other laws of this State forbid, and there is nothing unreasonable or vexatious in such a proceeding when produced by a necessity.

As Frank Ford and Jno. R. Jarboe were secured in their securityship for Wm. Jarboe by mortgage on his home farm, no cause of attachment existed as to them. Without averring and showing the insufficiency of their security, he could not have disposed of this so as to

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defeat them, if their mortgage was properly recorded, which seems to have been the case; but as he induced them to take out attachments, he cannot be heard to object and defeat them for this cause. The other creditors might, perhaps, defeat them by showing that this was a fraudulent arrangement to secure the debtor's property from his other creditors; but there can be no such question as between the plaintiffs and the defendant.

The act of 1861, *Myers' Supplement*, authorized the clerk to issue attachments on debts not due. The legal title of the storehouse and lot claimed by W. T. Jarboe was in his father; he had bid it off at a decretal sale, and, as we must presume, accepted the commissioner's deed. Having never notified the commissioner to make it to his son, the assignment of the certificate of purchase of anterior date to the deed is, of itself, no evidence, when assailed by creditors as fraudulent; for it has often been decided by this court that the recital of deeds even are not, when assailed by creditors as fraudulent.

Wm. Jarboe's home tract consisted of three different contiguous tracts purchased from different vendors. The middle tract being nearly two hundred acres, on which the dwelling-house was situated, and that mortgaged to Ford and Jarboe. It sold for just the mortgage debt and costs.

As some of the debts were subsequent to June 1, 1866, he claims that a homestead of one thousand dollars' worth should have been assigned him out of the other portions of the tract.

The act of February 10, 1866 (*Myers' Supplement*, 715), provides, that "there shall be exempt from sale under execution, attachment, or judgment of any court, *except*

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for a foreclosure of a mortgage given by the owner of a homestead, or for purchase money due therefor, so much land, *including the dwelling-house and appurtenances*, owned by the debtor, as shall not exceed in value one thousand dollars." Said act also provides the manner of proceeding to ascertain the value; and if the homestead is of greater value than one thousand dollars, and not divisible, for a sale, and the payment of one thousand dollars to the debtor to purchase him another home; and by section six this act is only to apply to white persons "who are actual *bona fide* housekeepers, with a family," and not then to existing debts prior to the purchase of the land or erection of the improvements thereon.

It is most manifest, therefore, that the object was to secure to a white debtor with a family the house in which he may live and the appurtenant lands, not exceeding one thousand dollars. It may not be essential that the family should be actually in the house when the execution may be levied, but it must then be the actual *bona fide* residence, or, in other words, the home place, so actually regarded by the debtor; and if actually living there, he shall mortgage it, he thereby waives his right of exemption, unless the home house and appurtenant lands shall be sufficient to pay the mortgage and leave him a surplus.

We will not say that if the lands so mortgaged should be sufficient to pay the mortgage, and still leave him a thousand dollars for a home, he may not claim it; but we do say, if the mortgage debt exhausts the mortgage premises of dwelling-house and appurtenant lands, not leaving a surplus, though it be of more than one thousand dollars in value, that then he is precluded from asserting a right to a homestead out of other lands; because this would be extending the homestead right beyond the language of

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the enactment, and this, too, whether the mortgage be for prior or subsequent debts to June 1, 1866.

So far, as sustaining the attachments and ordering the sales, we find no errors; but as to the manner of the commissioner's sales, as these were properly questions, and motions on notices to the purchaser, to set them aside, we do find errors.

The commissioner advertised for sale the home tract, containing "*about three hundred acres;*" the Buckman tract, "*containing about three hundred;*" and the Jack Raley tract, "*containing two hundred acres;*" G. B. Mudd tract, "containing two hundred and two acres;" and "*commission house.*" He reports that he actually sold that part of Jarboe's home tract mortgaged, *except one acre*, at $1,781 84. He next sold "the Wm. Gates part of the home tract, said to contain ninety-eight acres, and the one acre adjoining, which was left of the other tract, making ninety-nine acres." He then sold "that part of the home tract, containing fifty acres more or less. The tract was sold in gross." He then sold the Buckman tract in two parcels; and also sold the Raley tract in two parcels; and the Mudd tract of two hundred and two acres; and the commission house.

If the commissioner might sell these several tracts in parcels under the judgment, it was his duty to so advertise them; the object of the law being to inform the public that a sale of certain property will occur, and to invite them to the sale.

As was held by this court in *Hahn vs. Pindell* (1 *Bush*, 540), an advertisement of a sale in gross is no notice of a sale in parcels; and an advertisement of a sale in parcels is no notice of a sale in gross; and for the very potent reason, that a person wishing to purchase a part of the tract would not be invited by such a notice to a

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sale of the whole tract in gross; nor would one wishing to purchase the whole tract be invited to a sale of it in parcels; therefore, the sale must pursue the advertisement, whether it be in gross or by parcels.

As to the land, all the sales were a departure from the advertisement, save as to the Mudd tract of two hundred and two acres; and Jarboe's exception to said sales should have been sustained, except as to it. On a return of the cause, said sales should be set aside, and before another sale, the tracts of land should be surveyed to ascertain how much they severally contain, should Jarboe require it. And if the interest of the parties require a sale in parcels, it would be well for the court so to adjudge and direct the commissioner.

The sale of the Mudd tract of two hundred and two acres to Thomas Durham seems to be regular, and it is sustained.

The commissioner's deed to William Jarboe shows he purchased the commission house and ground, as therein described; yet the ground was neither advertised nor sold by the commissioner in this case, but only the *house*. This perhaps was an oversight; but it was a fatal one to any sale of the house, as well calculated to be injurious both to the debtor and the purchaser, for which reason it must be set aside, and a resale ordered.

Although W. T. Jarboe's claim to the commission house was rather informally presented, yet, after choosing the manner of its presentation, and as it was substantially and justly adjudicated, and as the Code does not require that it should be by formal pleadings, and as the real issue was tried, we see no reversible error for him.

Wherefore, the judgment confirming the several sales is reversed, except as to Thomas Durham, and affirmed

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as to him, with directions for further proceedings consistent herewith. The attaching creditors will recover their costs against Wm. Jarboe; and he will recover his costs against all the purchasers and defendants on the motion to set aside the sales, save as to Thomas Durham, who will also recover his costs as to Wm. Jarboe; and the attaching creditors, litigating with Wm. T. Jarboe, will also recover their costs of him.

CASE 19—PETITION ORDINARY—OCTOBER 6.

Dedway vs. Powell.

APPEAL FROM GREENUP CIRCUIT COURT.

1. *Words susceptible of a two-fold meaning*, one imputing a felony and the other amounting to a trespass only, it was the province of the jury to determine, from the circumstances, in what sense they were intended and understood.
2. "*It is not so!*" "*It's not so—no such thing!*" These words being used by a party to a suit on trial before a justice of the peace, in reply to answers made by a witness who was being cross-examined by him, *are actionable.* As the words are susceptible of an innocent and an offensive meaning and understanding, their determination was properly left to the jury.

ROE, For Appellant,

CITED—

2 *Greenleaf, sec.* 414.

3 *Blackstone, Sharswood's ed.*, 122, *sec.* 5.

4 *Bibb*, 99; *Martin vs. Melton.*

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ED. F. DULIN, For Appellee,

CITED—

10 *B. Mon.*, 418; *Mills and wife vs. Wimp.*

5 *Mon.*, 396; *Wiley vs. Campbell.*

Cook on Defamation, pp. 9, 13, 14.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellee was a witness on a trial before a justice of the peace between George Wallace and appellant, and to a question by the latter, on cross-examination, he made answer, to which appellant replied, "It is not so;" and to the answer of appellee to another cross-question, he replied "It's not so—no such thing!" Upon the trial of this action of slander, the witnesses stated that these replies by appellant were "in an excited, angry tone, which produced some consternation in the crowd;" and "that the manner and tone of the expressions of Dedway induced them to believe that he meant that Powell was swearing a lie, and they so took it."

The court refused, at appellant's instance, to instruct the jury to find for him, to which exception was taken; but substantially referred the meaning and intention of appellant to the jury, saying, if he meant to charge appellee with perjury, then they must find for him; but if not, then for appellant.

The jury found for the plaintiff two hundred and fifty dollars, one hundred dollars of which he remitted, and the defendant has appealed.

In *Nash vs. Eakle* (7 *J. J. Mar.*, 424), this court said: "As the words were susceptible of a two-fold meaning, one imputing a felony and the other amounting to a trespass only, it was the province of the jury to determine, from the circumstances, in what sense they were uttered and understood. This is the rational and legal rule as

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now well established by authority." (*Starkie on Slander*, 44 *to* 55, *and authorities cited.*)

As the appellant, in his answer, confessed the trial and the speaking of the words, but denied he meant to impute perjury or false swearing to appellee, and only meant he was mistaken; that he regarded him as an upright, honest man, &c., perhaps the verdict may be regarded as somewhat harsh; but appellee seems generously to have remitted one hundred dollars, without solicitation. Still, as matter of law, there was no error in refusing appellant's instruction; and as these words are susceptible of an innocent and an offensive meaning and understanding, their determination was properly left to the jury.

Judgment affirmed without damages, no supersedeas appearing.

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CASE 20—PETITION ORDINARY—OCTOBER 6.

Jones vs. Hood.

APPEAL FROM ADAIR CIRCUIT COURT.

1. The penalty of double damages denounced by *section* 3, *article* 1, *chapter* 50, *Revised Statutes* (2 *Stanton*, 49), against any person not having a lawful fence, who shall, in any mode, hurt, lame, kill, or destroy any cattle which may have broken over or through said fence into his inclosure, applies to one who used and controlled the premises, *whether he was the owner or not.*
2. In an action for killing a mare by chasing her with dogs by the defendant, within a field under his control, not inclosed by a lawful fence, *it was error to instruct the jury that the defendant was not liable to damages, if he only did what other prudent persons might have done.*

T. C. WINFREY, **For Appellant,**

CITED—

Civil Code, sec. 153.

GARNETT & BARKER, **For Appellee,**

CITED—

Revised Statutes, section 3, *article* 1, *chapter* 50.
2 *Metcalfe*, 122; *Hardin*, 539.
2 *J. J. M.*, 310; *Creel vs. Bell.*
3 *J. J. M.*, 391; 7 *B. Mon.*, 123.
7 *B. Mon.*, 109; 8 *B. Mon.*, 192
10 *B. Mon.*, 256.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In this action of trespass for killing the appellant's mare, the petition contains two counts—the first charging that the appellee, possessing a field not lawfully inclosed, set dogs on the mare which had happened to

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enter, and that he so chased her as to cause her death—and the second only charging an ordinary trespass; and claiming under the first double damages, according to the provisions of *section* 3, *chapter* 50, *article* 1, *of Revised Statutes*, *p.* 49, in these words: "If any person, not having a lawful fence, shall, *in any mode*, hurt, lame, kill, or destroy any cattle which may have broken over or through said fence into his inclosure, he shall pay to, or satisfy the owner or manager of said stock, double damages."

The appellee was not the owner of the field, but lived with the owner, and from facts proved, the jury might reasonably have inferred that he used and controlled it, and not only injured, but killed the mare by chasing her with his dogs.

Nevertheless, on a full general issue, the jury, under instructions, returned a verdict for the defendant; and, thereupon, the court, overruling a motion for a new trial, rendered judgment in bar of the action.

The instructions imported that the charge under the statute could not be sustained without proof that the appellee was the owner of the field and inclosure, and also that he was not liable to damages under either count if he only did what other prudent men might have done. This was wrong and misleading. Dogging the mare as the appellee did, without first trying more gentle means of expulsion, could not have been prudent or lawful, and, therefore, the instruction on that point was at least abstract and misleading. And the true interpretation of the statute does not, as erroneously indicated by the instructions, require that the appellee should have owned the field and its inclosure. Both its letter and spirit include any person in possession of them, or assuming the use or superintendence of them; and no such person had a right

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to "*hurt in any mode.*" In two essential particulars, therefore, the jury was misinstructed by the court.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

CASE 21—PETITION ORDINARY—OCTOBER 6.

Morgan, &c., vs. Bank of Louisville.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. Commercial paper, which was made in New Orleans, Louisiana, before the war commenced, matured, was payable, and protested for non-payment in that city after the war became flagrant in 1861. The maker and first indorser were residents of Louisiana; the last indorser was a resident of Kentucky. The paper was held and protested by a bank in New Orleans, although it, at that time, belonged to a bank in Kentucky. *Held*—That in order to make the Kentucky indorser responsible, it was essential that he should have been notified of the protest at the earliest reasonable practicable moment after mail communications were re-established from New Orleans after the raising of the blockade of that place in 1862.
2. Indorsers, resident in the jurisdiction of one belligerent, of commercial paper which matures, is payable, and protested for non-payment in the jurisdiction of the other, whilst the war is flagrant, are entitled to notice of the protest at the earliest reasonable practicable moment after mail communications are re-established. If such notice is not given, such indorsers are exonerated from liability.

JAMES SPEED and
THOMAS B. FAIRLEIGH, For Appellants,

CITED—

Conn. vs. Penn., &c., 1*st Peters' C. C. R.*, 524.
Dennison vs. Imbree, 3 *Wash. C. C. R.*, 403.

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Griswold vs. Woddington, 16 *Johns.*, 484, 489.
Phillimore, 3*d vol.*, 735; *Wheat. Int. Law, sec.* 307.
4 *Met.*, 402; *Norris vs. Donaphan.*
1*st Parsons on Notes and Bills*, 481–2, 523, 532,
20 *N. Y. R.*, 407; *Beale vs. Parish.*
Story on Bills, secs. 234, 294, 308, 365.
Edwards on Bills and Notes, 649, 606.
Bouvier's Dictionary, word "Delay."
111 *Kent, side page* 107, *note a*, 109.
2 *Smith*, 223; *Patience vs. Townley.*
3 *Wend.*, 491; *Schofield vs. Bayard.*
2 *Brock.*, 20; *Hopkirk vs. Page.*
25*th vol. U. S. Digest, p.* 86, *and* 48*th Penn. State Rep.*, 261.
2 *Duvall*, 108; *Graves vs. Tilford.*
Ib., 288; *Bell, Berkley & Co. vs. Hall's ex'r.*
Ib., 379; *Berry vs. Southern Bank of Kentucky.*
3 *McLean's Rep.*, 583; *Hill vs. Norvell.*
1 *Met.*, 658; *Bondurant vs. Everett.*
3 *Litt.*, 498; *Farmers' Bank vs. Butler.*
4 *Hill*, 129; *Selden vs. Benham.*
Chitty on Bills, 12*th Amer. ed., side pages* 388, 389.
2 *Dallas*, 102; *Hoare vs. Allen, &c.*
Ib., 132; *Foxcraft & Galloway vs. Nagle.*
Stanton's Rev. Stat., p. 500, *sec.* 5.
Myers' Supplement, p. 57.
8 *Dana*, 114; *Lathrop vs. Com. Bank Sciota.*
2 *Douglass* (*Mich.*), 230; *Orr vs. Lacy.*
11 *Wheat.*, 271; *Armstrong vs. Toler.*
Angell & Ames on Corporations, sec. 161.
7 *Wend.*, 24; *L. & F. Ins. Co. vs. Mechanics' Fire Ins. Co.*
3 *Ib.*, 582; *Beach vs. Fulton Bank.*
Cowper, 341; *Holman vs. Johnson.*

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HAMILTON POPE, For Appellee,

CITED—

3 *Littell*, 499; *Farmers' Bank, &c., vs. Butler.*

1 *Met.*, 661; *Bondurant vs. Ellis.*

7 *Gill*, 217; *Bell vs. Hagerstown Bank.*

9 *Met.* (*Mass*), 583; *Chicopee Bank vs. Moses E. Taylor.*

5 *Met.* (*Mass.*), 212; *Eagle Bank vs. Hathaway.*

17 *Maine*, 366; 20 *Alabama*, 322.

2 *Duvall*, 108; *Graves vs. Tilford.*

2 *Duvall*, 292; *Bell, Berkley & Co. vs. Hall's ex'rs.*

2 *Duvall*, 379; *Berry, &c., vs. Southern Bank of Ky.*

Revised Statutes, sec. 5, *Act of* 1858, 2 *Stant.*, 500.

Smith on Constitutional Construction, secs. 518, 529.

Loughborough's Statutes, 82, 101.

7 *B. Mon.*, 548; *Pilcher vs. The Banks.*

8 *Dana*, 117; *Lathrop vs. Commercial Bank Sciota.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This was a suit upon the note of Morgan for two thousand five hundred and ninety-two dollars, dated New Orleans, La., January 23, 1861, payable at the office of Pilcher & Goodrich, New Orleans, at nine months' time, with eight per cent. interest, and indorsed by Pilcher & Goodrich and B. P. Scally. The note was not paid at maturity, but protested by a notary public in New Orleans.

Morgan, the maker, let judgment go by default; but Scally, the indorser, insists that he is not liable.

The evidence establishes the following facts, to-wit: That Scally resided in Louisville, Ky., when the note fell due, and ever since; that there was then a war between the Southern and Northern States, and no mail communication between New Orleans and Louisville; that the

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latter post had fallen into the Federal possession, and a mail sent hence to New York May 3, 1862, from which time mail communication became regular and safe once a week; and that the blockade of New Orleans, by order of the President of the United States, was raised June 1, 1862; that said paper was held by the New Orleans Canal and Banking Company until November 20, 1862, when it was sent by express to the Bank of Louisville, at Louisville, Kentucky, which owned it, and that December 5th, 1862, the cashier of the Bank of Louisville deposited a notice in the post-office at Louisville, notifying Scally of the dishonor of said paper; that by the laws of Louisiana and custom of merchants such paper is regarded as commercial.

Was this a legal notice to the indorser, Scally?

It is insisted by appellee that no protest or notice was necessary, because of the late civil war, Louisville and New Orleans then being within the military lines, and held by different belligerents, and claim that this has been so adjudicated by this court in *Graves vs. Tilford*, 2 *Duvall*, 108; *Bell, Berkley & Co. vs. Hall's ex'rs*, *Ib.*, 392, and *Berry, &c., vs. Southern Bank*, *Ib.*, 379.

The first case was upon assigned notes—not commercial paper—hence no question of commercial law was involved.

In the case of *Bell, Berkley & Co. vs. Hall's ex'rs*, suit with attachment, was brought but a few days before the bill of exchange fell due—January 13, 1862; it had been drawn, indorsed, and accepted in Kentucky, but payable in New Orleans; the war was flagrant when it fell due; the bill had not been forwarded to New Orleans for payment, but was in suit in Kentucky; it would have been illegal to attempt then to collect this bill in New Orleans; the maker and indorsers of the bill not only had the pre-

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sumed notice of open hostilities between the two States, but the actual notice by suit that the holder was looking to them.

In *Berry vs. Southern Bank*, the bills of exchange were drawn and indorsed in Kentucky, and sold to a Kentucky bank, addressed to a firm in New Orleans the very day of the President's proclamation of blockade, the official notification of war between Kentucky and Louisiana, and which were not payable until after the Congressional act of non-intercourse and the President's proclamation thereof.

These bills were not accepted, and no evidence that they were ever in New Orleans; but suit was prosecuted upon them against the drawer and indorsers, who resided in Kentucky. It was held, upon these facts, that the war rendered it not only unnecessary, but illegal, to send said bills to New Orleans for collection; and, therefore, protest unnecessary and notice immaterial, as the public war was itself a notification; and this doctrine is well announced by the court of error in New York (16 *Johnson's R.*, 443; *Griswold vs. Waddington*) well drawing a distinction between commercial paper drawn in one country, payable in another before and after war breaks out between these countries.

But the facts in the case now under consideration are quite different from those in *Berry vs. Southern Bank.* In this case the paper was made in New Orleans before the war broke out, payable in New Orleans after it broke out; the maker and first indorsers were residents of Louisiana when it fell due, and the paper held by a New Orleans bank, though it belonged to a Kentucky bank; and the last indorser, who is now resisting it, was a resident of Kentucky.

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The war could be no notice to him that the maker and first indorsers, who were residents of Louisiana, had not paid it to a Louisiana holder; therefore, it was essential to notify him of the fact at the earliest practical period.

The New Orleans holder very properly had it duly presented and protested for non-payment, and notified the Louisiana parties thereof, but could not then notify the Kentucky parties. But reasonable diligence would not require a sending of the notice by the very first mail sent out by the military authorities from New Orleans, through a portion of the enemies' country, because the sending of such mail might not be known, nor might be safe, if known. When, however, the mail became regular and notorious and safe, it was the duty of the New Orleans holder to notify its principal that it might notify the antecedent Kentucky parties.

In *House vs. Adams & Co.* (48 *Penn.*, 266), the Supreme Court of Pennsylvania, in case of two bills of exchange drawn and indorsed in that State, on a New Orleans house, and which were protested—the first, June 11th, 1861, the second, July 29th, 1861—and notice of dishonor received by the holders at Pittsburg, July 11th, 1862, and was immediately delivered to the antecedent parties there, held, upon the authority of *Patience vs. Townley*, 2 *Smith's English R*,. 224,-*and Hopkins vs. Page*, 2 *Brock, U. S. R.*, 20, that notice of the dishonor of such paper was essential so soon as it could reasonably be made; but as, from the evidence, it appeared that the first mail received at Pittsburg from New Orleans was about July 1, 1862, and considerable intervals between them, the notice was deemed reasonable and the indorsers held liable.

The blockade was removed from the port of New Orleans June 1, 1862. The mails were regularly sent

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to New York, and thence to other places within the Federal lines, regularly once a week. There appears no reasonable excuse for delaying the sending of this paper from New Orleans until November 20, 1862. A delay of five months and twenty days after the blockade was raised, with regular weekly mails, which had gone safely once a week for a month, cannot be deemed reasonable, nor accounted for by the then political situation of the country.

The ports of the Gulf and Southern Atlantic were blockaded by the Federal navy; no part of the route from New York to Louisville was through the enemies' country, or in their possession; hence, the line of communication between New Orleans and Louisville, via New York, remained open and uninterrupted.

Wherefore, the judgment is reversed as to Scally, with directions for further proceedings in accordance herewith.

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CASE 22—PETITION ORDINARY—OCTOBER 7.

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Hoglan vs. Carpenter.

APPEAL FROM BULLITT CIRCUIT COURT.

1. The office of postmaster is incompatible with the office of county judge.
2. By accepting or continuing to hold any office of trust or profit under the United States, the incumbent thereby vacates any civil office in Kentucky which he holds, or to which he may be elected. (*Constitution of Kentucky, sec.* 18, *art.* 8; *Patterson vs. Miller*, 2 *Met.*, 293.)
3. Whilst the acts of *a de facto officer* are good and binding as to third parties, as to himself they are null, and may be questioned by any kind of proceedings, and in all proceedings.
4. A certificate of election, or even a commission, is not *prima facie* evidence of eligibility to the office.

THOMPSON, For Appellant,

CITED—

Constitution of Kentucky, sec. 18, *art.* 3.
4 *B. Mon.*, 224 *and* 479; *Harcourt vs. Rodman.*
2 *Metcalfe*, 499; *Patterson vs. Miller.*
3 *Metcalfe*, 7; *Commonwealth vs. Adams.*
15 *B Mon.*, 459; *Tinsley vs. Tinsley, &c.*
Civil Code, sec. 401.

A. H. FIELD, For Appellee,

CITED—

Revised Statutes, sec. 3, 1 *Stant.*, 328.
Constitution of Kentucky, sec. 18, *art.* 8.
2 *Met.*, 497; *Patterson vs. Miller.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Hoglan having been elected presiding judge of the county court for Bullitt county in 1863, and having acted as such, refused to surrender the records, &c., pertaining to said office to Carpenter, though he had been elected

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in 1866, and commissioned as such judge for said county; whereupon, he brought suit against Hoglan to recover them, to which the latter, by answer and cross-petition, set up that Carpenter was postmaster at Shepherdsville, under appointment from the United States, when elected, and had continued so to act even after he had entered upon the discharge of his duties as county judge under his commission; denied that he could constitutionally hold the latter office, and denounced him as an usurper in office, and claimed that he himself was rightfully the county judge until his successor was legally installed into office.

To this cross-petition Carpenter replied; but his reply has been misplaced, and is not in the record; but his counsel insists that he therein set out that Hoglan, after he had been elected and was acting as such county judge, accepted the appointment of provost marshal for said county from the United States, and acted as such; and also accepted the office of military enrolling board from the same government, and that thereby his office of county judge became vacant, and that his continued exercise of its duties constituted him an usurper.

Upon the trial, the court refused to let Hoglan prove that Carpenter was postmaster when elected, and continued to act as such for months after he was acting as county judge, to which exceptions were taken, but finally dismissed Carpenter's petition, because he had not legally qualified under his commission, and then dismissed Hoglan's cross-petition upon demurrer.

It has heretofore been decided by this court, that the holding of the office of postmaster under the United States was incompatible with the holding of a State office, under section 18, article 6, State Constitution; and as said by this court in *Patterson vs. Miller* (2 *Met.*,

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293), his certificate of election is not even *prima facie* evidence of his eligibility to the office, nor indeed is his commission; and though, whilst his acts are good as to third persons, though he be ineligible, because he is *de facto* an officer, yet, as to himself, they are null, and may be questioned by any kind of proceedings and in all proceedings.

The court erred in rejecting the proffered evidence. But, on the return of the cause, Carpenter should be permitted to file another reply, and to make proof that Hoglan had accepted and acted as provost marshal of the United States, or any other office thereunder, after he had been commissioned as county judge, for thereby he vacated the office, and of course could not maintain his cross-petition.

Whilst the oath of office taken by Carpenter before J. W. Carpenter, a justice of the peace, August 16th, 1866, is quite informal, yet we think it substantially sets out the essential requirements that the incumbent had taken the several oaths prescribed by the Constitution and laws of the Commonwealth; and if it had not, this could not be determined in this kind of procedure, as this would be a mere informality, and not a constitutional ineligibility.

If, on the final trial, it should be ascertained that both claimants are usurpers, and that neither is the legal incumbent, it should be so declared, that the proper and legal steps may be taken by the proper authorities to have a legal incumbent placed in the office.

Wherefore, the judgment is reversed, with directions for further proceedings not inconsistent herewith.

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CASE 23—MOTION—OCTOBER 7.

Smith vs. Wells' adm'x.

APPEAL FROM SHELBY CIRCUIT COURT.

1. On a motion for judgment on a bond suspending a sale of property levied on to satisfy an execution under section 713 of the Civil Code, in determining its sufficiency *the notice* should be considered in connection with the bond.
2. A landlord does not waive his exclusive lien for rent upon his tenant's property by taking personal security for the rent. The acceptance of such personal security is not inconsistent with the lien conferred by the statute.
3. A surety in a tenant's bond for rent may take up the bond, and have it assigned to him, so as to substitute him to all the rights and liens of the landlord.
4. Sale under an execution-levy, on property of a tenant upon which his landlord has a lien for rent, may be suspended by the landlord, or by the surety of the tenant in his bond for the rent, by executing bond as provided in section 713 of the Civil Code. On such bond, when the property levied on is not sufficient to pay the rental, the plaintiff in the execution is not entitled to any judgment.
5. A judgment for damages is erroneous in ordering the payment of damages by reference to the bond—"*and also the ten per cent. in damages, as agreed to, in the bond herein*"—without ascertaining any specific sum to be recovered.

Z. WHEAT and
J. L. CALDWELL, For Appellant,

CITED—

Civil Code, secs. 481, 479.
3 *Metcalfe*, 347; *Terrell, &c., vs. Cecil.*
4 *Metcalfe*, 257; *Thompson vs. Healey.*
18 *B. Mon.*, 622; *Todd vs. Caines.*
2 *Stanton's Revised Statutes*, 99, 100.
1 *Littell*, 27; *Bonta vs. Clay.*

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1 *J. J. Mar.*, 503; *White's ex'rs vs. Guthrie.*
2 *Metcalfe*, 43; *Williams vs. Woods, &c.*
Revised Statutes, sec. 6, *chap.* 22.
Story's Equity, sec. 1226.

BULLOCK & DAVIS,
J. W. MIDDLETON, and
T. N. & D. W. LINDSEY, For Appellee,

CITED—

Civil Code, secs. 481, 716, 489, 713.
18 *B. Mon.*, 663; *Watson vs. Gabby.*
3 *J. J. Mar.*, 163; *Ducker vs. Gray.*
3 *J. J. Mar.*, 557–8; *Clark vs. Hunt.*
3 *B. Mon.*, 50; *Burk, &c., vs. Chrisman, &c.*
Taylor on Landlord and Tenant, sec. 565, *page* 417.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

On the 30th day of January, 1866, W. W. Smith and V. M. Smith, his wife, as principals, and T. M. Smith and Reuben B. Smith, as their sureties, executed their covenant to James F. Middleton, stipulating that they would pay said Middleton six hundred dollars on the 25th of December, 1866, for the rent of a farm for a term ending at that time.

Afterwards, and while W. W. Smith and wife occupied the leased premises as tenants of Middleton, two executions were issued against W. W. Smith, one of them in favor of Marion Duvall, and assigned to Sarah W. Wells, administratrix of W. W. Wells, deceased, and the other in favor of said administratrix, both amounting to four hundred and twenty-two dollars and twenty-five cents, which were levied by the sheriff on twenty-five fat hogs as the property of the defendant on the leased premises; and said Reuben B. Smith

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claiming the property, caused the sale of the hogs to be suspended by executing a bond, as required by section 713 of the Civil Code of Practice, in the sum of five hundred and twenty-five dollars, being the appraised value of the hogs and ten per cent. thereon.

Subsequently, Reuben B. Smith obtained from Middleton the obligation given him for rent, with the following assignment:

"Reuben B. Smith, the security on the within bond, having paid me the six hundred dollars secured to be paid herein, I hereby assign to him the said claim of six hundred dollars, the amount of rent agreed to be paid herein, and substitute him to all my rights as landlord, to enable him to collect the said rent. I retain, however, all my claim and right against all the obligors in the bond for the performance of all the other conditions and obligations set forth herein. December 14th, 1866. JAS. F. MIDDLETON."

On the 6th day of September, 1867, the appellee moved the court for a judgment on the bond of Reuben B. Smith and W. W. Smith, upon filing a notice executed on them, the body of which is as follows:

"Take notice, that I will, on Saturday, the 6th day of September term, 1867, of the Shelby circuit court, make a motion in said court for a judgment on your bond, executed by you to me on November 4th, 1866, attested by G. M. Harbison, sheriff of Shelby county, in the case of Sarah W. Wells, administratrix of W. W. Smith."

Upon hearing the motion, the court adjudged "that the plaintiff recover of the defendant, Reuben Smith, the sum of three hundred and thirty dollars and fifty-three cents" and costs, "and also the ten per cent. in damages, as agreed to in bond herein." And the defendant has appealed to this court.

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It is insisted for the appellant—1st. That the court erred in overruling a motion which was made to dismiss the proceeding, on the ground that the notice did not state the nature and grounds of the motion; 2d. That as it was shown the hogs were in the possession of Middleton's tenant on the leased premises, for the rent of which the appellant was responsible, he had a right to cause the sale to be suspended by giving bond as a claimant, for the reason that a lien existed on the property which he might have enforced for his relief as surety for the rent; and that the subsequent transfer from Middleton vested in him a complete paramount lien on the property, constituting a valid defense to the motion of the appellee; 3d. That the judgment as to damages is irregular and erroneous.

As supporting the first objection taken to the judgment, we are referred to the 481st section of the Civil Code, which requires, in certain summary proceedings upon notice and motion, that "the notice shall state, in plain and ordinary language, the nature and grounds of the motion."

This proceeding, although a special one, is not, we think, of the class of summary proceedings to which the requirements of said section 481 were intended to apply, where the party proceeded against must necessarily look to the facts stated in the notice for the grounds of the motion; as in the case of a surety against his principal, or a client against an attorney; but the remedy is given upon the bond by the 716th section of the Code, in these words: "The party to whom the bond is executed may move the court to which it is returned for a judgment thereon against all or any of the obligors or their representatives, *having given to them ten days' notice of the motion.*"

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It seems to us the notice in this case, considered in connection with the bond, was sufficiently explicit, and the court properly refused to dismiss the motion for insufficiency of notice.

The second ground on which a reversal is sought, involves the inquiry whether Middleton did or not, in taking personal security for the rent, waive his lien on the tenant's property; and if he did not so waive this lien, whether the appellant, in consequence of his suretyship, as the assignment of Middleton, had a claim on the property of W. W. Smith, which should have been preferred to that acquired by the levy of the appellee's executions. By the provisions of the Revised Statutes, in relation to landlords and tenants, as amended in 1858 (2 *Stanton*, 99), it is provided, "that a landlord shall have an exclusive lien on the produce of the farm or premises rented; on the fixtures; on the household furniture, and other personal property of the tenant, or under tenant, found upon the rented premises, after the possession is taken under the lease."

Although it has been held, under particular circumstances, that a vendor may waive his lien for purchase money by the acceptance of other security, the principle of such decision is not, we think, applicable to this case. There is nothing in the acceptance of personal security for the rent inconsistent with the lien conferred by the statute in a case like this, where there is no evidence of an intention to treat the original claim as discharged by the acceptance of any mere obligation, or the creation of a new debt; and it seems to us that a lien existed for the rent, although other security was taken.

We are also of the opinion that the assignment of Middleton was sufficient to substitute the appellant to

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the claim of Middleton and the lien to secure its payment; and on the trial of the motion, which involved the question whether the property was subject to the executions or not, the appellant was in the same position which Middleton might have occupied, if he had retained his debt, and controverted the appellee's claim to subject the property under her executions.

As the value of the property appears to have been less than the appellant's claim, the appellee was not, in our opinion, entitled to any recovery. The judgment is also erroneous in ordering the payment of damages by reference to the bond, without ascertaining any specific sum to be so recovered.

Wherefore, the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

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CASE 24—PETITION—OCTOBER 8.

Commonwealth vs. First National Bank of Louisville.

APPEAL FROM FRANKLIN CIRCUIT COURT.

Shares of stock in National Banks in Kentucky are liable to a tax of fifty cents on each share of one hundred dollars; and the officers of such banks can be legally compelled to pay these taxes for their respective shareholders. This is the same tax which is imposed upon State institutions, and is collected in the same mode. (*Act of February* 9, 1865, *Myers' Supplement*, 482; *Revised Statutes*, *sec.* 1, *art.* 2, *chap.* 83, 2 *Stanton*, 239; *and sec.* 1, *art.* 10, *chap.* 83, 2 *Stanton*, 266.

JOHN M. HARLAN, Attorney General, and
JOHN RODMAN, Attorney General, For Appellant,

CITED—

Act of Congress of June 3, 1864, 2 *Brightley's Digest*, 51, *sec.* 41.

3 *Wallace*, 573; *Van Allen vs. Assessors.*

Bradley vs. People of Ills.; People vs. Commissioners N. Y.

Wright, &c., vs. Stilz; Frazer vs. Siebern, Ohio; and Markoe vs. Hartrauft—the last four cases being re-reported in Law Register for June, 1867.

JOHN W. BARR and
PIRTLE & CARUTH, For Appellee,

CITED—

Act of Congress of Feb. 21, 1862.

2 *Peters*, 449; *Weston vs. City of Charleston.*

2 *Black.*, 628; *Bank of Commerce vs. New York.*

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2 *Wallace*, 200; *Bank Tax Case.*
Act of Congress as amended in 1864, *sec.* 41.
3 *Wallace*, 573; *VanAllen vs. Assessors.*
Act of March 11, 1867, *Ky.*
Act of Feb. 9, 1865, *Ky.*
4 *Wallace*, 459; *Bradley vs. People.*
4 *Wallace*, 244; *People vs. Commissioners.*
Revised Statutes, 2 *Stanton*, *pp.* 239, 266.
Revised Statutes, Myers' Supplement, p. 482.
National Currency Act of Congress, Feb. 23, 1865.
23 *Ind.*, 331; *Whitney vs. City of Madison.*
4 *Wheaton*, 316; *McCullough vs. Maryland.*
9 *Wheaton*, 738; *Osborne vs. U. S. Bank.*
16 *Peters*, 435; *Dobbins vs. Commissioners.*
23 *N. Y. R.*, 204; *People vs. Commissioners.*
Markoe, &c., vs. Auditor General of Pennsylvania.
MSS. Opn.—probably reported in last Pennsylvania Reports.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This was a suit by the Commonwealth to compel the defendant to pay into the revenue of the State fifty cents on the share of stock therein, as required by the act of Assembly of February 9, 1865 (*Myers' Supplement to the Revised Statutes*, 482), and which is as follows:

"§ 1. That it shall be the duty of the officers or managers of the banking associations, which have or may hereafter be established within this State under the act of Congress, entitled 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' to file with the Auditor of Public Accounts a statement, verified by affidavit of the presiding officer or cashier of the association, showing the amount of capital stock, *and the*

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number of shares into which the same may be divided; and it shall be the duty of such officers or managers, annually, on the first Monday in July, to pay into the public treasury of the State, in aid of the Sinking Fund, *a tax of fifty cents on each share thereof*, equal to one hundred dollars of the capital stock of said association: *Provided, however*, That if the capital stock shall at any time be increased or diminished, it shall be the duty of such association to revise and amend the statement required by this act, so as to exhibit, at all times, the true amount of capital stock held by such association."

The only other State statute applying to this controversy is chapter 83, 2 Revised Statutes, section 1, article 2, page 239, as follows:

"*Specific taxation on real and personal estate.*—On bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations, or societies."

And article 10 of said chapter, 2 Revised Statutes, 266, as follows:

"*Payment of revenue by banks and other corporations into the treasury.*—§ 1. The cashier of a bank and the treasurer of any other institution whose stock is taxed, shall, on the first day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and the said bank or corporation shall thereby forfeit the privileges of its charter."

No bank or stockholder in the State pays less than fifty cents on each share of one hundred dollars in the capital stock of a bank, by either a general or special statute. There is, then, no question of inequality of this attempt-

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ed taxation of shares in the national banks and the State banks; no discrimination against shareholders in the national banks and in favor of shareholders in the State banks; but the former stands upon an exact footing of the most favored of the latter.

The only question, then, is this mode of taxation contrary to the first and second provisions of section 41 of the Congressional act of June 3, 1864, chapter 106, entitled "An act to provide a national currency," &c., as follows:

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided*, That the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

As was said by the United States Supreme Court, in *VanAllan vs. The Assessors* (3 *Wallace*, 584), "*the tax on the shares is not a tax on the capital of the bank;*" and "that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations within the limits prescribed by the act authorizing their organization."

Nothing can, therefore, be clearer than that the shareholders in these national banks, located in this State, can be made to pay the same tax that shareholders in the

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banks authorized by the State laws are compelled to pay, to-wit: fifty cents on each share of one hundred dollars. Now, this State statute does not tax the capital of the banks, but the shares of one hundred dollars; and whether these shares be worth fifty dollars or two hundred dollars each, matters not, because all shares of one hundred dollars in every bank of the State is taxed the same, regardless of their marketable value; and there is here, as elsewhere, a great difference in the value of shares or stock in our different State banks, some being worth largely more than others; and so it is with the national banks; still all are required to pay and to be alike assessed.

As the tax is laid upon the shares, and not upon the capital of the bank, it is really and *bona fidely* a tax upon the shareholders; but as many of these are non-residents, and could not be reached by the laying taxes upon their shares or stock, and looking alone to them for payment, the State laws require the cashier of the banks to pay this tax upon their shareholders. If there be any provision of the congressional enactment authorizing these associations to prevent the States requiring of the officers of the association to pay the tax levied upon its shareholders, it has not been pointed out, nor seen by us. The great if not sole object of Congress was to secure the national bank associations from a discriminating tax, and not that the tax should be collected in a particular manner.

If, therefore, the State should only tax shareholders of these associations the same as shareholders in their own banks, the mode of obtaining payment was not regarded material; and especially should this not be the case when not only the tax, but the mode of obtaining it, is precisely the same as it is in this case; for the State requires of

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the officers of her State institutions to pay the tax due by their respective shareholders.

In the case of *VanAllan vs. The Assessors*, the Supreme Court of the United States reversed the judgment of the appellate court of New York sustaining the right to tax the shares in the national banks under the State statute of New York of March 9, 1865, because said statute provided that such shares should be taxed as personal property, and did not provide they should only be taxed at the same rates that shares in the State banks were; but, on the contrary, it appeared that shares in the New York State banks were not taxed at all, because the capital of such banks were taxed.

So, in *Bradley et al. vs. Illinois*, decided by the Supreme Court of the United States in 1867, reversing the decision of the Supreme Court of Illinois, holding shares in national banks taxable under the Illinois statute of February 14, 1857, which did not tax the shares, but the capital of her State banks, together with the surplus profits or reserved funds.

In the case of *New York ex rel. D. Duer vs. The Commissioners of Taxes for the City and County of New York, and The Same ex. rel. R. Mead vs. The Same*, the Supreme Court of the United States affirmed the judgment of the appellate court of New York, sustaining a tax on the shares in the national banks without deducting therefrom the amount of the capital invested in United States bonds, not taxable under State authority, because it held these were only attempted to be taxed as other personal property was taxed under the laws of New York, and not more than was assessed upon shares of State banks. And in *Wright, auditor, and Meyer, treasurer, of Marion county vs. Stelz*, the Supreme Court of Indiana held, that no tax could be levied on the shares in the national

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banks under the Indiana statute; for, to use their own language, "the plain reason that no such tax is imposed on the shares of any banks organized under the authority of the State," as, "we tax our own banks upon their paid in capital, and do not tax the shareholders thereof upon the value of their shares." (*Laws of* 1861, *p.* 17.) And in *Frazer vs. Siebern et al.*, the Supreme Court of Ohio held, that the shares in national banks could not be assessed under the statute of that State, because it did not provide for a deduction for the capital invested in government bonds not subject to State taxation, whilst such deduction was made as to the State banks, and which were taxed upon their capital.

Thus it will be seen that no adjudication of either the Supreme Court of the United States, or any State, has as yet decided, that where a State taxes the *shares* and not the capital of her own banks, and then looks to the officers of the bank to pay this tax, instead of pursuing each individual stockholder, that the same tax, to be collected the same way, may not be assessed upon the shares in the national banks.

In *Louisville Savings Bank, &c., vs. Commonwealth* (14 *B. Mon.*, 409), this court held, that, notwithstanding there was no specific clause in the charter of the appellant providing for a tax of fifty cents on each share of one hundred dollars, as was the case in all the banks of circulation, that still the bank officer was liable to pay the fifty cents on each share, as provided in section 1, article 2, and in section 1, article 10, chapter 83, Revised Statutes, before quoted.

This tax of fifty cents on the share is the least and only tax assessed upon the shares or shareholders of our State banks, and the bank officers are required to pay this for their shareholders. This policy is obviously

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both reasonable and convenient; it is but reasonable and fair that the State should have this tax from the non-resident as well as resident shareholders, in associations which exist by her laws, and have franchises peculiarly beneficial and exclusive conferred by her authority. What other convenient and certain mode of getting this from the non-resident shareholders, but by making it the duty of the officer of the institution to pay for its stockholders? But it is convenient, even if all the stockholders were residents; for then these would be scattered through the various counties of the State, as the certificates of stock are transferable.

When the State shall only tax shares in the national banks at the same rates, and shall collect the tax by the same means as applicable to the State banks, every substantial requirement of the national bank act of Congress has been complied with.

To suppose that Congress intended that the States should exercise this sovereign power, as to taxing shares in national banks, that they, by their State laws, exercise as to their own banks' shareholders, and then to quibble about the means of collecting the tax, is beneath the dignity of the question and the high source of the enacting power.

When the wants of the governments, both State and National, were limited, their revenues abundant, though derived from but few sources, and taxes comparatively light, these revenue laws were not so closely scanned; but now that taxes are enormous, the demands great, and resources not adequate thereto, moneyed institutions and capitalists, ever Argus-eyed, are searching for every pretext to escape the public burdens; but as they are permitted to shove these from their shoulders, they become proportionately heavier upon the producing and

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humbler classes, and do them an enormous injustice; hence courts, neither Federal nor State, should lend a too listening ear to their clamor to escape a reasonable and just proportion of the taxes so essential to liquidate both State and National obligations.

Believing that our State laws, so far from conflicting with the Congressional enactment, are in strict harmony with it, and that the shares in the national banks are legally liable to a tax of fifty cents on each share of one hundred dollars, and that the bank officers can be legally compelled to pay these taxes for their respective shareholders, the judgment of the circuit court dismissing the petition is reversed, with directions for further proceedings to assess the shares in said First National Bank at fifty cents for each share of one hundred dollars, and to adjudge the amount against the proper officers, as provided in our State enactment.

It would be wholly foreign from the objects of Congress to attempt to enact by what means the States should collect their taxes.

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CASE 25—PETITION EQUITY—OCTOBER 8.

Hayden, &c., vs. Moore.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. The widow of a deceased partner being sued as one of the members of the firm, made no defense, and judgment was rendered against her by default. She sued out an injunction, alleging that she was advised by one of her co-defendants that she was not bound for the debt, and that judgment could not be recovered against her, and that for this reason she made no defense, &c. Although not a partner, and in no-wise liable for the debt, the circuit court properly dismissed her petition and injunction.
2. *If the plaintiff or his attorney*, before judgment, either directly or indirectly, puts a party who is not liable for the debt sued on, off his guard, or prevents him from defending the action, such conduct would entitle the injured party to relief.

RAY & HARDIN, For Appellants,

CITED—

Myers' Civil Code, secs. 373, 379, 299, 584, *and notes* 488 *and* 491.

SWEENEY & STUART, For Appellee,

CITED—

Civil Code, 4th sub-section of section 579.

11 *B. Mon.*, 219.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Prior to August, 1865, L. R. Queen and Frank Curran were engaged in distilling, as partners, under the firm name of L. R. Queen & Co. Before the partnership was dissolved L. R. Queen died, leaving appellant, H. A.

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Hayden, then H. A Queen, his widow, who subsequently married appellant, Q. F. Hayden.

L. R. Queen died intestate, and administration on his estate was granted to L. M. Queen, his brother, and he and Curran continued the business of distilling under the old firm name of L. R. Queen & Co.; and in 1865 executed a note to appellee, Moore, in the name of said firm, for the hire of a slave whom they employed in the business. This note was not paid, and an action was brought on it by appellee against L. M. Queen, F. Curran, and the then widow, H. A. Queen, as the persons who composed said firm.

When the summons was served upon her she took it in her hand and went to her brother-in-law, L. M. Queen, and asked him what it meant and why was she sued? He replied that she was not bound for the debt, and they could not recover any judgment against her; that the proceeding was merely formal against her, and she was in no danger.

Lulled by the information received from her friend, and deceived innocently, doubtless, on his part, so far as one can be innocent who counsels one on subjects of which he is ignorant, she made no defense to the action; and judgment was rendered against her with the other defendants, L. M. Queen and F. Curran.

This action was afterwards brought by herself and husband, with injunction to be relieved from said judgment, to satisfy which her property was levied on by the sheriff.

There is no evidence whatever that appellee Moore, or his attorney, either directly or indirectly, had any communication whatever with her; she neither sought advice from them nor any attorney, but went to her brother-in-law, who told her she was in no danger, and, confiding in him, she gave herself no further concern

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about it. L. M. Queen's deposition was taken; but the most he proves is, that Moore's attorney told him the sheriff would make the money out of the property of the other defendants, and *that* was subsequent to the rendition of the judgment against her. The injunction was dissolved, and the petition dismissed; and from that judgment this appeal is prosecuted.

Relief was properly refused. If judgments could be set aside or perpetually enjoined upon the grounds made out in this case, a resort to judicial tribunals for remedies or a redress of grievances would be too uncertain to be relied upon, or to command the confidence of any one.

This is but another, added to the almost numberless cases with which judges are too often confronted, where the innocent become the unfortunate victims of those who assume to be competent to give advice, and are as ignorant on the subject as those who make the application; and courts are powerless to afford legal relief.

If appellee or his attorney had, before judgment was rendered against Mrs. Hayden, said to her that she was made a defendant in the action *pro forma*, and that they had no intention of making her responsible for the debt, or had done or said anything to put her off her guard or prevent her from defending the action, such conduct would have entitled her to relief. But there is no evidence that either of them contributed in any way to lull or deceive her. It was her misfortune to consult and act upon the advice of a friend, who was as ignorant as herself on the subject, and failed by the use of proper means to enable himself to give safe counsel.

The evidence, it is true, shows satisfactorily she was not a partner, and was not bound originally for the debt, and, by the use of proper means, could have defeated a

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recovery against her; but having failed to use the means of escape which the law afforded her at the proper time, she is now remediless.

Wherefore, the judgment is affirmed.

CASE 26—PETITION EQUITY—OCTOBER 8.

Jacob vs. Jacob, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. "All my estate, real and personal, * * * shall be equally divided among my children. * * * The share of my estate allotted to my son William R. Jacob, shall be retained by my executors, paying to him during life, quarter-yearly, the net proceeds of the rents and profits thereof; * * * but he shall have no power to sell or encumber any part of the estate allotted, or the profits thereof, or to anticipate its receipt; nor shall the same be in any way liable for his debts. After his death the property, with the unexpended avails, shall be conveyed and paid to his descendants, * * * in the same manner as it would pass by the law of descents, if the same were to descend from him. If there be no such descendants, then the same shall be conveyed and paid to his heirs."

Wm. R. Jacob died, leaving a widow and one child. In construing the foregoing clauses, &c., of the will of John I. Jacob, *the court held*, that the legal title of W. R. Jacob's share remained in the executors as trustees, and that the testator intended to carve out a life estate only to him; that he did not take a fee by implication, but only a life estate, with remainder, which passed by the will, and not by the law, to his descendants or heirs; but these devisees in remainder, though taking under the will, and not as descendants or heirs of W. R. J., still take precisely the same as though the property had descended by law from him; *and his widow took a dower interest as*

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legatee by implication, and the child took the other estate in fee, just precisely as though the property had been owned in absolute fee by its father, and he had died intestate.

2. A widow is entitled to dower, as legatee by implication, in the life estate which was devised to her husband, with remainder at his death to pass by the law of descents to his descendants.

3. Previous clauses of a will must be construed as harmonious with subsequent clauses, and if inconsistent therewith, they must give way under a familiar rule, that the last will must prevail.

J. F. BULLITT and
E. M. YERGER, For Appellant,

CITED—

12 *B. Mon.*, 65, 73, 74, 76; *Northcut vs. Whip, &c.*
Act of 1796, *sec.* 14, 1 *M. and B.*, 444, *and* 11*th sec.*, *p.* 443.
Revised Statutes, chap. 80, *sec.* 10.
14 *B. Mon.*, 560; *Turman vs. White's heirs.*
Hill on Trustees, chap. 2, *sec.* 1, *and s. p.* 248.
2 *Jarman on Wills, s. pp.* 194, 181, 32.
8 *B. Mon.*, 616; *Deboe vs. Lowen.*
8 *B. M.*, 625; *Grimes vs. Ballard.*
6 *Cruise's Digest, p.* 181.
1 *Jarman on Wills, s. p.* 465.
1 *Mon.*, 25; *Chinn and wife vs. Respass.*
1 *Dana*, 199; *Stone's adm'r vs. Halley.*
1 *Scribner on Dower, pp.* 229, 270, 271, 273, 294, *&c.*, 802.

F. K. HUNT, For Appellees, and
R. W. WOOLLEY, For some of the Beneficiaries,

CITED—

1 *Jarman on Wills, s. p.* 830.
2 *Jarman on Wills, s. p.* 810.
1 *Sim. R.*, 66; *Graves vs. Dolphin.*
1 *Russ. and Myt.*, 395; *Green vs. Spicer.*

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18 *Ves.*, 429; *Brandon vs. Robinson.*
2 *Redfield on Wills*, 665–7.
4 *Kent's Com.*, 131.
2 *Caine's R.*, 353; *Newkirk vs. Newkirk.*
5 *Paige*, 583; *Hallett vs. Thompson.*
8 *Paige*, 83; *Clute vs. Bool.*
1 *M. & B.*, 443; 2 *Rev. Stat.*, 230, *chap.* 24, *sec.* 2.
Rev. Stat., *chap.* 80, *sec.* 6, 2 *Stant.*, 230.
12 *B. M.*, 483; *Johnson vs. Ellis.*
3 *Met.*, 260; *Samuel vs. Salter.*
8 *B. Mon.*, 56; *Pope's ex'rs vs. Elliott & Co.*
MSS. Opn.; *Stewart and wife vs. Brady.*
14 *B. Mon.*, 560; *Turman vs. White.*
MSS. Opn., *Jan.*, 1852; *Humphreys vs. Evans.*
Williams' Law of Real Property, 49, 192.
14 *B. Mon.*; *Daniel vs. Thompson.*
16 *B. Mon.*; *Carr and wife vs. Estill.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE MAJORITY OF THE COURT:

By the second item of his will, John I. Jacob devised all his estate, "real and personal, to my (his) executors, the survivor or survivors of them, *for the purpose of executing this will.*"

"3d. All my estate, real and personal, after the payment of my debts, shall be equally divided among my children by three commissioners, to be appointed by and under the supervision of the Louisville chancery court, except as herein directed.

"11th. The share of my estate allotted to my son, William R. Jacob, *shall be retained by my executors, paying to him during his life*, quarter-yearly, the net proceeds of the rents and profits thereof, after deducting repairs, insurance, and taxes, with power to sell any unimproved

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property in his share for the purpose of investing the proceeds in permanent improvements; but he shall have no power to sell or encumber any part of the estate allotted, or the profits thereof, or to anticipate its receipts; nor shall the same be in any way liable for his debts. *After his death, the property, with the unexpended avails, shall be conveyed and paid to his descendants, if there be any such living, in the same manner as it would pass by the law of descents if the same were to descend from him.* If there be no such descendants, then the same shall be conveyed and paid to his heirs."

The legal title of W. R. Jacob's share remained in the executors as trustees, to pay over quarterly the annual profits to him, with power to sell unimproved real estate, for the purpose of investing the proceeds in permanent improvements.

When the commissioners should divide the estate, as provided in the will, and allot William's share, still the legal title would remain in the executors, *for the purpose of executing the will*, which, so far as he was concerned, would be to pay over to him the annual profits during his life, and at his death to convey and pay to his descendants or heirs, in such proportions as they would be entitled to had the estate descended from him to them.

The testator clearly manifested a desire to make the estate as profitable to William during his life as could reasonably be done consistent with the rights of those in remainder, by vesting the power in the executors to sell unimproved estate and vest it in improved; and that he intended to carve out a life estate only to his son William, is quite as apparent from his vesting the legal title in his executors, there to remain until his son's death, without power of alienation, conditional or otherwise,

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in him, and then to be conveyed to his descendants or heirs, thereby clearly making a remainder, which passes by the will, and not by the law, to William's descendants or heirs.

It was not intended by the testator that there should be any incongruity in the different items of his will; therefore, the second, third, and eleventh should be construed as consistent and harmonious, unless the language disallows this.

The second devised all his estate to his executors, for the purpose of executing his will; and so far as William is specially named and provided for, it is found in the eleventh item, and which gives him the profits for life, with remainder to his descendants or heirs. The third clause was, then, evidently intended to specify the portions and manner of the division—that is, equally and by three commissioners, to be appointed and controlled by the chancery court. Having therein provided that the estate was to be divided into equal shares, and by what process this was to be ascertained, except as to some specific devises following, the testator then proceeds with his direction and devise as to each share, making the desired limitations, &c.; and this is made the more manifest in the twelfth, thirteenth, and fourteenth clauses, by which he directs that the property allotted to his daughter, Susan Maria, and his other daughters, "shall be held by my executors in same manner as in the eleventh clause mentioned, for the use and benefit of each of said daughters, severally, during her life, * * * and after her death to be conveyed and paid to her descendants or heirs, as in said clause mentioned;" and as to property allotted to each of his sons, except John, to be held "in like manner, for like use of each of said sons, severally, during his life, with like restrictions," &c., "and after his death

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to be conveyed or paid to his descendants or heirs, as in the eleventh clause directed;" and in the fourteenth clause he restricts John's interest in the farm devised to him to its use for life, with remainder over.

Thus he had, by subsequent clauses, each, however, referring to the eleventh clause, limited the previous devises to a life estate in all his other children, and no perceptible motive can be seen for exempting William from this general purpose of the testator to give a life estate to his children, with remainder over to their descendants.

Whatever construction, therefore, might have been given to the third clause, uncontrolled by the subsequent clauses, yet, with this manifest purpose of the testator therein appearing, it must be construed as harmonious with the subsequent clauses, or, if inconsistent therewith, it must give way under a familiar rule, that the last will must prevail.

But these devisees in remainder, though taking under the will, and not as descendants or heirs of William, still take precisely the same as though the property had descended by law from him. In other words, had there been children and grandchildren, whose parents were dead, then each child would take a share, and the children of the dead child would take the share their parent would have been entitled to if alive. So, as William left a surviving widow, and but one child and descendant, the widow took a dower interest, as legatee by implication, and the child took the other estate in fee, just precisely as though the property had been owned in absolute fee by William, and he had died intestate.

All these provisions manifest an intention in the testator, that, should any of his sons die, his surviving wife should be endowed, as he devises the remainder to those who would take under the laws of descent from the holder of the life estate.

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The authorities are abundant, and need not be recited, to show that William did not take a fee by implication, but only a life estate.

The appellant is entitled, as legatee by implication, to so much as she would have taken from her deceased intestate husband had he owned the estate.

Judgment reversed, for further proceedings consistent herewith.

JUDGE ROBERTSON, though concurring in the judgment, does not concur in the reasoning herein.

JUDGE ROBERTSON CONCURRING WITH THE DECISION OF THE MAJORITY OF THE COURT IN THE FOREGOING OPINION, BUT NOT CONCURRING WITH THE REASONING THEREIN, DELIVERED THE FOLLOWING SEPARATE OPINION:

After the opinion first delivered unanimously by this court, a rehearing was granted on an able and earnest petition of a party that had not been heard before that decision. The case has not been reargued except by that petition.

The majority of the court has taken back the first opinion, and substituted another, essentially different, on the construction of the will of J. I. Jacob. Both opinions allowed the widow of W. R. Jacob dower, and concur in one of two grounds adjudged by the first; and, consequently, I concur in the conclusion of the last opinion. But as the unanimous concurrence in so much of the last opinion, as gives to the widow all she claims, I thought it unnecessary and rather unsafe to overrule, by a bare majority, the construction of the will given in the first opinion. I considered it more prudent and befitting to leave that superfluous matter undecided as it stood when the rehearing was granted. But as the majority saw fit to take another course, and I cannot concur in its changed construction of the will, and, able

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as the petition is, have not changed my opinion, but feel it rather strengthened by a more careful consideration of the case and scrutiny of the authorities cited, none of which, in my judgment, apply essentially to the provisions of Jacob's will, I will submit my former opinion for the ground of my dissent; and, as I have no time to devote to the unnecessary purpose of elaboration, I will only add, that the opinion, as now rendered, will deprive all the daughters and most of the sons of the testator of more than a life estate, and this increases the force of my objections to it.

This is a friendly litigation between a widowed mother and her infant daughter, for the purpose of obtaining a judicial construction of a devise by *John I. Jacob* to his son, *William Robinson Jacob*, the husband of the widow, and father of the daughter, who is his only child.

The devisee, *W. R. Jacob*, having survived the testator and died intestate, his widow claims dower in the estate devised to him; and his infant daughter's next friend, claims the whole of the estate unencumbered by dower.

The Chancellor adjudged the whole estate to the child; and this appeal by the widow requires a revision of that judgment.

The clauses of the will which bear directly on the question herein involved are as follows:

"2. I devise all my estate, real and personal, to my executors, the survivor or survivors of them, for the purpose of executing this will.

"3. All my estate, real and personal, after the payment of my debts, shall be equally divided among my children by three commissioners, to be appointed by and under the supervision of the Louisville chancery court, except as herein directed.

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"11. The share of my estate allotted to my son *William Robinson Jacob* shall be retained by my executors, paying to him during his life, quarter-yearly, the net proceeds of the rents and profits thereof, after deducting repairs, insurance, and taxes, with power to sell any unimproved property in his share for the purpose of vesting the proceeds in permanent improvements; but he shall have no power to sell or encumber any part of the estate so allotted, or the profits thereof, or anticipate its receipts; nor shall the same be, in any way, liable for his debts. After his death the property, with the unexpended avails, shall be conveyed and paid to his descendants, if there be any such then living, in the same manner it would pass by the law of descent if the same were to descend from him; if there be no such descendants, then the same shall be conveyed and paid to his heirs."

Other provisions in the will prescribed the same restrictions and qualifications on the property to be allotted to some of the testator's other sons, and to all of his daughters; and all the inter-alotments had been made before the death of *William Robinson Jacob.*

The spirit and context of the will manifest a cautious purpose to preserve the estate devised to most of the testator's children for the benefit of themselves and families, and for secure transmission to their immediate descendants or heirs; and that provident aim was his only presumed motive for devising the legal title to his executors and securing the equitable title from improvident alienation or encumbrance by the testamentary beneficiaries to whom, by the third clause, he devised it, *without limitation as to time*, except in the usufruct for life.

The will imports an absolute devise to his children, subject only to the legal title in the trustees, and to the

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express limitations on their use and on their power of disposition by sale, mortgage, or devise. The use, and not the *title*, is expressly limited to the life only of the beneficial owner of the title. Had the testator intended that the title should cease with the life, no reason for such a purpose has been suggested or can be presumed; and why, in the legatory clause or elsewhere, did he not expressly say so? And if he intended that descendants should take by purchase and not by law, why did he not say so explicitly; and why, in relation to the ulterior transmission of title, did he use the words "descendants or *heirs?*" If he so intended, he has been strangely unlucky in the use of langage which imports what he did not mean. The devise of the equitable title of his entire estate, to "be equally divided" among all the testator's children, certainly passed the whole of that title to each of them as afterwards allotted. This is the plain construction of the third clause, *which alone devises the estate;* and this must be its inevitable effect unless controlled by some other provision limiting the estate to life. We see no such express limitation; nor is there any other provision which implies any such limitation. The only limitation on the equitable fee simple is that contained in the eleventh clause, and that is only on any alienation or encumbrance of the title. The direction to the trustees to convey the legal title and pay any residual profits to the descendants or heirs, does not imply such limitation. The only presumable reason for that direction was, that the legal title had been devised to the trustees for a purpose fulfilled at the death of the testamentary recipient of the equitable right, and whoever succeeded to that equity was entitled to the legal title which the holders of it alone could convey; and, so too, as to the unexpended profits in the same custody. And why did the

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testator simply direct conveyances and payments instead of devising the title directly to those to whom the conveyances were to be made? The will does not, in our opinion, devise a life estate in the title and also a remainder. We presume that, if the testator had so intended, his language would have been unambiguous and essentially different from that which his eminent counsel employed.

Having secured the title from alienation by the devisees to the prejudice of "their descendants or heirs" to whom it would then go by law, there was no necessity for a specific devise for transmitting by will precisely the interest which would, undevised, pass to the same persons, and to exactly the same extent. There could be no consistent motive for such apparent absurdity, unless he intended, unreasonably and unjustly, to deprive widows of dower and surviving husbands of curtesy; and such a purpose could not be imputed to such a man and such a father as John I. Jacob, of Louisville; and such an intent is also negatived by his silence on that subject, and by his declaration that the transmission should be *as by descent.*

By harmonizing the will consistently with its context, and with reason and justice, the appellee's title is that of the heir of her father, and not of a devisee of her grandfather; *but if the appellee even holds as devisee and not as heir, the testator's declaration that the title shall pass as if it descended from her father, subjects it to all the same legal consequences so far as the widow is concerned, and reserves all her rights as in estate descended from her husband. Therefore, even according to this interpretation of the will, the testator did not intend to cut her off;* and, consequently, as widows here are dowable of equitable estates which descend, the appellant is entitled to dower in this case.

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CASE 27—PETITION EQUITY—OCTOBER 8.

Pack vs. Carder, &c.

APPEAL FROM GRANT CIRCUIT COURT.

1. The unpaid purchase price of land being specifically recited in the deed as *two notes executed by a third person* to a third person, these third persons not being parties to the conveyance, and the notes not secured by a lien expressly reserved in the deed, on the question, did a constructive lien result under the statute (*sec.* 26, *chap.* 80, 2 *Stant.*, 230), *the court was equally divided.*
2. When the note of a third party is taken as part of the purchase price of land conveyed by deed, in which a lien is not expressly reserved to secure the note, whilst the court is equally divided on the question of lien, all the judges concur in the opinion that the holder of the note is bound to use due diligence to collect it; and if the note is not collected for want of such diligence, whether it is secured by lien or not, the loss must fall upon the holder, who was guilty of the laches resulting in its non-collection.

JOHN L. SCOTT and
T. N. & D. W. LINDSEY, For Appellant,

CITED—

3 *Bibb*, 183; *Cox vs. Fenwick.*
3 *Littell*, 192; *McGee vs. Beall.*
5 *J. J. Marshall*, 324; *Richardson vs. Baker.*

E. H. SMITH, For Appellees,

CITED—

Revised Statutes, sec. 26, 2 *Stanton*, 230.
3 *J. J. Marshall*, 178; *Stewart vs. Hutton.*
6 *B. Mon.*, 71, 72; *Honore's ex'r vs. Bakewell.*
1 *Starkie's Evidence, page* 549.

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CHIEF JUSTICE WILLIAMS DELIVERED THE FOLLOWING OPINION, IN WHICH JUDGE HARDIN CONCURRED:

W. F. Carder holding the equitable title, by the bond of H. Wallace and J. J. Carder, for a tract of land, sold it August 25, 1865, to Joshua Pack, in consideration of four thousand four hundred and sixty-seven dollars and seventy-five cents.

G. W. Nichols then being indebted to Pack in a like sum, it was agreed that he should execute his two notes to W. F. Carder for two thousand two hundred and thirty-three dollars and eighty-seven and a half cents each, payable respectively December 25, 1865, and December 25, 1866, both of which recites their consideration as "*being for a tract of land this day bought by Joshua Pack from said Carder, and deeded by Wallace and Carder.*"

The deed of Henry Wallace and J. J. Carder to Pack for the land was made the same day, and recites that it is made "in consideration of the sum of four thousand four hundred and sixty-seven dollars and seventy-five cents, *payable* as follows: two thousand two hundred and thirty-three dollars and eighty-seven and a half cents *to be paid* on the 25th December next, at which time possession is to be given; the other half—two thousand two hundred and thirty-three dollars and eighty-seven and a half cents—*to be paid* on the 25th day of December, 1866, *for which two payments* George W. Nichols *has this day executed his notes of even date herewith, payable to W. F. Carder.*"

Carder assigned the second note to Wallace, who, by due diligence, prosecuted Nichols to insolvency, and then recovered it of his assignee, W. F. Carder.

Nichols remained good for nearly a year after the first note was due, and then became insolvent; but Carder took no legal steps to have this debt collected.

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Carder filed one suit in his own name and one in the name of himself, Wallace, and J. J. Carder, to enforce a lien upon the land; and, in the original petition, asserted a lien by virtue of the terms of the deed; but to make his claim stronger, by amended petitions he asserted that it was expressly contracted that he should have a lien for the purchase price to be paid by Nichols, and that the draftsman was instructed to so draw the deed by both parties; and if it was not so done, it had been left out by mistake; he prays for an enforcement of his lien, &c. Pack denies every essential allegation as to this lien and mistake.

N. H. Jeffers, the draftsman of the deed, states, that "*the parties were all present, either at the time of writing the deed or reading and signing of the same, and it was the understanding between all the parties that there was a lien on the land for the purchase money, the notes for the purchase money being executed by G. W. Nichols, and the deed made to Joshua Pack.*"

Not a single witness in the case pretends to contradict this statement of the draftsman. It is true, that Nichols says "he thinks he was present when the deed was signed and acknowledged, and that he has no recollection that there was any lien reserved on the land, or anything said about a lien that day, or at any other time; that he was rather forgetful sometimes, but had no recollection of such conversation about the sale and lien. He also says that Pack and Carder came to him, and he thinks Carder said that he had sold his farm to Pack, "*provided I could make the payments to suit;* I then asked what payments he wished, and told him, at the same time, that I owed Pack money; that I would give him my individual notes, payable in two payments, as set out in the deed, which I did execute and deliver to Mr. Carder." Also, in a previous

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conversation, that Carder said that Pack and himself had been trying to trade for several days, but he would not sell the land to him unless "I would give my notes in payment."

B. Crook states he was present at the circuit court clerk's office when Jeffers wrote the deed, and when it was executed by Wallace and Carder to Pack, *and don't recollect that Nichols was there*, but does recollect that the interested parties—that is, the Carders, Wallace, Pack, and Jeffers—were there, and says the deed was read over and then signed, and no objections were made to it.

This is all the evidence as to what occurred upon that day. One witness states a previous and one a subsequent conversation, but these at best only remotely indicate something inconsistent with a reserved lien. The evidence, instead of establishing that Carder desired to extend time to Nichols, proves that he was unwilling to sell, even by getting Nichols' notes, unless he could make the payments satisfactory, and even then he desired to retain a lien. The very careful recitals of this deed, that the consideration was "*payable*," not that it was paid in Nichols' two notes, "*to be paid*" at given dates, and for specified sums, and dated of "*even date herewith*," together with the pregnant fact that both notes recite that they are for the consideration price "*of land bought by Joshua Pack from W. F. Carder and deed by Wallace and Carder*," connected with the positive statement of the draftsman, "*that it was the understanding between all the parties that there was a lien upon the land for the purchase money*, the notes being executed by Nichols and the deed made to Pack, establishes, beyond all doubt, that it was agreed and understood that Carder retained a lien upon the land sold and conveyed. This is a suit be-

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tween the original parties, unencumbered with any equity of a third and innocent party.

It is then a question involving two inquiries:

1. Was it a statutory waiver?

2. Was it a common law waiver of the vendor's lien?

Section 26, *chapter* 80, *Revised Statutes* (2 *Stanton*, 230), enacted that "where any real estate shall be hereafter conveyed, and *the purchase money or any part thereof shall remain unpaid*, at the time of the conveyance, *the grantor shall not thereby have a lien, unless it be expressly stated in the deed what part of the consideration remains unpaid.*" It will be observed that this statute does not require that the purchase money should be *payable by the vendee;* it only requires that the deed should state what part *remains unpaid*, no matter by whom. Does this deed so specify? Could language be more appropriate or explicit to specify the unpaid purchase price, when and in what sums it was "*to be paid?*" It is the statement of the unpaid purhase price which retains the lien by failing to waive it; and had the words *for which a lien is reserved* been added, it would only have been evidence of the contract, *and could not of itself have created a lien*, for the statute makes no provision that such words shall at all be necessary. But if the direct and plain letter of the statute has been complied with according to the natural import of the language, and then to that be superadded the parol proof of a clear and explicit understanding that a lien was reserved, would it be anything but an arbitrary, and, at least, a doubtful construction, to say the statute disallows the lien because they were the notes of a third party, instead of the vendee, which constituted the unpaid consideration?

As the unpaid consideration was stated in the very language of the statute, it cannot be a statutory waiver.

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Then, what is the rule of equity, independent of the statute, on this subject.

It is well stated by the Supreme Court of California, in *Baum vs. Grigsby* (21 *Cal.*, 172), "when any other independent security is taken, as a mortgage on the land, or upon other property, *or the personal responsibility of a third person*, the lien is held to be waived, *unless there is at the time an express agreement for its retention. The taking of a distinct, independent security, is presumptive evidence of waiver.*"

The Supreme Court of Minnesota, in *Daughaday vs. Paine et al.* (6 *Min.*, 450), states the rule almost identically as follows: "That whenever the vendor shall take any security for the purchase money upon land sold, or upon any other land, or by pledge of chattels, *or by the absolute or conditional obligation of a third person, or any other security than the personal obligation of the vendee*, such fact shall be deemed conclusive of his intention to abandon his equitable lien, *unless he retain it by express agreement.*"

And the Supreme Court of Texas, in *Hutchison and wife vs. Patrick* (22 *Tex. R.*, 318), held, that, where the wife was the vendee, and the husband became personally responsible with her on the notes for the purchase price, and a lien was reserved in the deed, that this evidence of a retained lien rebutted the presumption of a waiver from the husband's becoming surety.

Story, in his Equity Jurisprudence, section 1224, says: "Generally speaking, the lien of the vendor exists, and the burden of proof is on the purchaser to establish that, in the particular case, it has been *intentionally displaced, or waived by the consent of the parties. If, under all the circumstances it remains in doubt, then the lien attaches.*"

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Again (*section* 1226) he says: "The taking of a security for the payment of the purchase money is not, of itself, as it was in the Roman law, a positive waiver or extinguishment of the lien. * * * But the taking a security has been deemed, at most, as no more than a presumption, under some circumstances, of an intentional waiver of the lien, and not as conclusive of the waiver. And if a security has been taken for the money, the burden of the proof has been adjudged to lie on the vendee to show that the vendor agreed to rest on that security, and to discharge the lien. *Nay, even the taking of a distinct and independent security, as, for instance, of a mortgage on another estate, or of a pledge of other property, has been deemed not to be conclusive evidence that the lien is waived. The taking of bills of exchange drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver of the lien,* but to be merely a mode of payment."

And such may be regarded as the settled American law, as recognized in this State, which makes the reception of another security or the taking a third person's note but presumptive evidence at best of a waiver of the lien.

The only object of the Revised Statute was to declare the conveyance of the title, without specifying the unpaid purchase price, a conclusive waiver of the lien, but made no other modification of the law regulating the vendor's lien. *This statute does not create the lien.* It was not designed for any such purpose. Its object was to declare the conclusive waiver of a lien by a conveyance, without specifying *the unpaid purchase price;* but when the unpaid purchase price is set out, whether this be owing by the vendee or another, we must look to the law, as existing before and outside of this statute, to see whether it has or not been waived by some other act of the parties.

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The ancient rule, that an answer in chancery could not be overthrown, except by the evidence of two witnesses, or one witness with strong corroborating circumstances, was changed by section 142, Civil Code, and which has been so expounded by this court in *Albro vs. Lawson* (17 *B. Mon.*, 644), and *Enders vs. Williams* (1 *Met.*, 354–5). The verification of each party to their pleadings now being regarded as equivalents, the issue is to be tried upon the evidence, as in ordinary actions at law.

The vendee has not only failed to make out the waiver of lien by the vendor in this case, but the latter has shown its existence by the positive evidence of one witness, which is strongly corroborated by both the recitals of the deed and the notes. And this court is asked to say that the lien has been waived, without the authority of the statute against the equitable rules long recognized as the law in such cases, and in utter disregard of all the evidence establishing the positive intention of the parties to preserve and retain a lien.

If this statute is to have such a constructive effect, it will prove to be one of the most delusive and disastrous laws ever enacted, as it will legislate vendors, in many instances, out of their intended liens, and out of their lands, as it is believed the general construction placed upon it by the country at large is, that if the unpaid purchase price is set out in a deed, whether this be owing by the vendee or some other, that this preserves the lien, and that many such transactions have been entered into.

Upon the language of the statute alone, unaided by any extrinsic proof, the construction must be doubtful, as is attested by the equal division of this court; but when the judgment of the lower court allowing the lien is sustained by the extrinsic evidence establishing a posi-

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tive intention to preserve a lien, the case becomes doubly formidable.

But as Nichols remained good for nearly a year after the first note fell due, and Carder took no steps to collect it, and as Pack still had an interest in its collection, so that the lien upon his land ought to be so far released, and as he would be injured to that extent by Carder's own conduct and laches, it would be unjust to allow Carder now to assert a lien for that note. Had Pack taken Nichols' note to himself and assigned it to Carder, this conduct would have released him, and his equity is quite as strong as if he had assigned the note. No such objection, however, exists as to the second note. Nichols was, with due diligence, prosecuted to insolvency upon it, and Carder should be allowed a lien therefor.

As the pleadings of both parties, the deed and notes and parol evidence, show that W. F. Carder was the holder of the equitable title and the real vendor, and that J. J. Carder and Wallace were the holders of the legal title, having sold to him, and that Nichols' notes were, by arrangement between him and Pack, made payable to him, how he can be called or adjudged as a stranger to the transaction or conveyance, is past my legal comprehension.

Judge HARDIN concurs with the CHIEF JUSTICE in this opinion. It results, therefore, that the judgment can only be reversed as to the note first due, and must be affirmed as to the other.

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JUDGE ROBERTSON DELIVERED THE FOLLOWING OPINION, IN WHICH JUDGE PETERS CONCURRED:

On the 25th of August, 1865, J. J. Carder and Henry Wallace, holding the legal title, and W. F. Carder owning the equitable right, to a tract of land of about one hundred and twenty acres, near Williamstown, Grant county, Kentucky, sold, and J. J. Carder and H. Wallace conveyed to Joshua Pack the tract for the consideration of four thousand four hundred and sixty-seven dollars and seventy-five cents, payable in two equal installments, one on the 25th of December, 1865, and the other on the 25th of December, 1866, by G. W. Nichols, who, being indebted to that extent to Pack, for money loaned or deposited, *and the vendor's refusing to trust Pack*, executed to W. F. Carder, alone, his own notes for each of those installments. The conveyance, reciting those facts, reserved no express lien on the land. On the 5th of February, 1866, W. F. Carder assigned to H. Wallace the note for the last installment; and on the 2d of January, 1867, no portion of the assigned note, and only about half of the other, having been paid, two separate and afterwards consolidated petitions in equity were filed against Nichols and Pack for enforcing payment by a sale of the land, each petition claiming a lien and alleging that a conventional express lien was omitted through inadvertence or mistake.

Pack's answer denied the entire allegations as to lien, and insisted that Nichols' notes, in discharge of Nichols' debt to him, were given and accepted as satisfaction by Pack, and as a waiver of lien.

During the progress of the case, the circuit court adjudged against Nichols the payment of the balance due on his notes, and a *fi. fa.* to enforce the judgment

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having been returned "no property," the court afterwards, on final hearing, decreed the sale of Pack's land to satisfy that personal judgment against Nichols.

This appeal seeks the reversal of the decree for the sale of the land, which seems to this court erroneous, on the ground that Pack, never having been personally liable for the consideration, there is no lien, either express or implied, on his land.

The pleadings, exhibits, and oral evidence, though in some respects rather vague, yet authorize the inference that Pack's only resource for buying a home was his money in the hands of Nichols, then accredited as not only solvent, but rich and safe; that it was his object to convert that fund into the land which he bought, and that only for the accommodation of Nichols, who preferred not to pay Pack immediately, the vendors, unable to sell without such payment or an extension of credit by themselves to Nichols' equivalent to payment, so far as Pack was concerned, chose to take Nichols' notes on time as so much money thereby paid by him to Pack and by Pack to them.

Why else did they not take Pack's assignment of the Nichols debt, or Pack's note with Nichols as surety?

The deduction from this sufficiently sustained hypothesis is, that the land being sold, not on the credit of Pack, but on that of Nichols alone, the acceptance of Nichols' notes was understood as payment by Pack of the whole consideration, and by Nichols of his debt to Pack; and that, consequently, Pack neither owes, nor ever owed, the appellees anything for the land.

The only consistent construction of all the facts is, that Pack agreed to buy the land if the vendors would take Nichols for pay, and substitute him as the debtor, whereby Pack surrendered all right to interest to accrue of

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Nichols' debt to him, and all control over the collection of the debt. And it seems to us that the recitals in the conveyance corroborate this conclusion, and not only do not imply a lien, but a waiver of it; and the authorities show that, even without that substitution, the acceptance of the notes presumptively waived all lien.

Before the enactment of the 26th section of the Revised Statutes, chapter 80, page 230, a vendor of land not fully paid for, held, if he took no other collateral security, an implied equitable lien on the land, which he might loose in favor of a subsequent purchaser or creditor of the vendee, without actual or constructive notice of the lien. The object of this 26th section was to prescribe a certain mode of giving that notice on the face of the deed itself. Such a deed does not, as hitherto expounded by this court, *give* a lien, but only affords proof that the equitable lien has been waived, unless the deed contains the prescribed recitals.

The recitals in the conveyance in this case show that the entire consideration remained unpaid, but was to be paid by Nichols, who had executed two notes for it to a person *no party to the deed.* There could have been no implied lien in favor of the holders of the legal title, who made the conveyance to Pack without owning any beneficial interest in the land or in the consideration. Nor, as the deed did not show that W. F. Carder, to whom Nichols' notes were executed, was beneficial owner of the land, or why he was the obligee, could a lien be implied in his favor. The recitals, therefore, could not, as contemplated by the statute, have operated as notice either that a lien was reserved, or in whose favor; but showing, as they did, that the consideration was to be paid by one stranger to another stranger, they imported that there was no lien, and especially against Pack, who seemed to be

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not liable for any part of the consideration. It seems to us that the deed does not recognize a lien any more than if it had not stated that the consideration had not been paid; and the statute provides, that without the required recital in the deed, "the vendor shall *not thereby have a lien.*" The non-conformity of the recital to the statute operated, therefore, as a waiver of any lien, and as notice to the world that the land in Pack's hands was unencumbered. (*Chapman vs. Stockwill*, 18 *B. Mon.*, 653.)

The recital does not appear to have been made for the purpose of securing a lien, but only to show, as every conveyance should, the extent and character of the consideration, who was to pay it, and to whom. And it seems to us difficult for scrutiny to detect any evidence that Pack owed, or was in any way to be responsible for, the consideration, or that the recital was made for reserving a lien on his land. Had there been any such design, we must think that it would have been indicated by some other phraseology more specific and intelligible.

This conclusion, obvious, as we think, on the face of the deed, is fortified by the following extraneous considerations:

1. It is intrinsically incredible that Pack would have consented to the extension of credit to Nichols—to suspend his own right to collect his debt then due by a solvent debtor—to surrender *indefinite* control over it to the vendors *not liable to him for diligence as assignees*—and to still hold his land subject to the payment of a debt which he thought he had paid, and the most of which might be and has been lost by the indulgence and extended credit of the vendors.

2. If a lien had been intended, it is probable that the circuity, delay, and expense of the suit against Nichols on his notes, would have been avoided by a suit at once for enforcing payment out of the land.

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3. If, *in such a case*, a lien on the land had been intended, there can be no reasonable excuse for not expressing it in the deed, instead of constructively expressing a negative idea.

4. The appellees themselves seem to have thought this when they, in the progress of the case, amended their petition by abandoning an implied lien and asserting an oral argument for an express lien, and averring that it was omitted through mistake.

5. Nichols, who was a principal in the negotiation, and present when the deed was executed, testifies that he heard nothing about a lien.

6. The appellant's step-son testifies to facts conducing to the presumption that, after Nichols had proved insolvent, the appellees did not hold the appellant responsible, or rely on a lien on his land.

These considerations, fully and fairly weighed, authorize the judicial conclusion that all resulting lien securable by the statute was waived, and that there is no sufficient proof of an express contract for a written lien. And these same facts not only do not repel, but fortify the *prima facie* presumption of a waiver of all lien on Pack's land by *the acceptance of Nichols' notes, even as collateral security only. Nor can we see how, against these facts, that presumption has been neutralized.*

Under these circumstances it would appear hard for the appellant, without imputed fault, to lose both his money and his land. And it does seem to us that such an appeal to a court of conscience for its extraordinary aid in forcing such a double loss for the benefit of negligent parties, should not be heeded. The petition ought to be dismissed.

This is the opinion of Judges Robertson and Peters, who would concur in a total reversal; but the Chief Jus-

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TICE and JUDGE HARDIN not concurring, equal division of the court prevents such a reversal. The court is, of course, unanimous in the partial reversal adjudged in the separate opinion of the CHIEF JUSTICE and JUDGE HARDIN.

CASE 28—TAXATION—OCTOBER 8.

Thomas, gd'n, &c., vs. Mason County Court.

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APPEAL FROM MASON COUNTY COURT.

1. A debt due or owing to a citizen of Kentucky by a citizen of another State, is taxable in Kentucky as part of the wealth of the State.
2. If a fund belonging to a citizen of Kentucky is employed for his benefit in another State, and is there taxed as his property, it is not taxable in Kentucky.
3. Borrowed capital in Ohio is taxable in that State as the borrower's property, and the debt due to the lender in Kentucky is taxable as the lender's property in Kentucky.

STANTON & THROOP, For Appellant,

CITED—

Revised Statutes, Equalization Act of 1852.
Revised Statutes of Ohio, vol. 2, *pp.* 1441–42, *sec.* 4.

W. S. FRANK, For Appellee,

CITED—

Revised Statutes, sec. 12, 2 *Stanton*, 253.
7 *Dana*, 343; *Johnson vs. Commonwealth.*
Loughborough, Statutes 1837–8, *p.* 511.
Acts of 1845, *p.* 80.
8 *B. Mon.*, 2; *Commonwealth vs. Hays.*

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Thomas, gd'n, &c., vs. Mason County Court.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Mary F. Thomas, an infant, and her statutory guardian, O. H. P. Thomas, both resident in the city of Maysville, Kentucky, moved the county court of Mason to reduce to ten thousand dollars an assessment to the amount of twenty-two thousand dollars, which had been made for the year 1867, against her or her guardian, under the equalization law; and they now complain that the court erroneously overruled the motion.

It appears that her father and her guardian, partners in business in Maysville, had, before the father's death, advanced to the mercantile house of Poyntz & Bruce, in Cincinnati, money, to be employed in the business of that house, which agreed to pay the taxes on it in Ohio, and to pay indefinite interest for the use of it. It seems agreed that the father's interest in that fund was twelve thousand dollars, and as such, the guardian listed it, together with ten thousand dollars in his hands, in Maysville, for taxation, in Mason county; but ascertaining that, for the same year, Poyntz & Bruce had been taxed under a local law of Ohio for the same fund, and had paid the tax, he made the motion in this case to test its liability to taxation also in Kentucky as the property of his ward.

Until a settlement of the accounts of the partnership with her deceased father, the precise amount of her interest in the Cincinnati fund cannot be known; but, as the parties seem to agree that it is at least twelve thousand dollars, we must so assume it to be; and although it may never have actually come to the hands of the guardian, yet it may be taxable in Kentucky as her property.

If that fund had been taxed as her property in Ohio, it ought not to be taxed again in Kentucky; but unless

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it had, as hers, been in an agent's hands in Ohio, the law of that State did not authorize the taxation of it as her property, but required Poyntz & Bruce to pay tax on it as their own property, used for their own benefit; and it does not appear that it was held by Poyntz & Bruce as her trustees, or for her use, but rather that it was used by them for their own benefit as borrowed capital. Then it was, by a statute of Ohio, subject to taxation as their property, and by a statute of Kentucky her interest in it, being her property here, was also liable to assessment as a part of the revenue of Kentucky. Borrowed capital in Ohio is taxable as the borrower's property there, and the debt due to the lender in Kentucky is taxable here as her property. In this case, the ward's right to the money in Ohio is a portion of the wealth of Kentucky, and ought to contribute to the burthens of the government which protects her; and if it could escape contribution by lending it in Ohio, a knowledge of that fact would encourage the exhausting deportation of the money of Kentucky to augment the wealth of some other State.

Consequently, concurring as this court does with the county court, that the debt due to the ward in Ohio is her property here, and legally assessable for taxation in Mason county, the judgment of that court is affirmed.

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CASE 29—PETITION EQUITY—OCTOBER 9.

McMahon vs. Lewis.

APPEAL FROM DAVIESS CIRCUIT COURT.

Whilst under the statute a married woman, having estate, may bind herself for necessaries, it is essential that the credit originally should be given to her, and not alone to her husband; for if to him alone, and she afterwards signs a note with him therefor, she will not then be an original debtor, but a mere surety, and her property cannot be subjected to its payment.

SWEENEY & STUART, For Appellant,

CITED—

Revised Statutes, sec. 1, *art.* 2, *chap.* —, 2 *Stant.*, 8.

2 *Met.*, 252; *Pell vs. Cole.*

3 *Met.*, 335; *Marshall vs. Miller.*

RAY & HARDIN, For Appellee,

CITED—

2 *Stanton, page* 8.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The store account of appellant, though for necessaries for the family, was charged alone to appellee's husband, and the only witness who testified being appellant's clerk, does not state that credit was given to Mrs. Lewis.

When, by a subsequent arrangement, her husband gave his note to Sinnett, and she signed it with him and Anderson, and appellant also signed it, she must be regarded as a security, and not as a principal.

Whilst under our statute a married woman, having estate, may bind herself for necessaries, it is essential that the credit originally should be given to her, and not

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alone to the husband; for if to him alone, she will not then be an original debtor, but a mere security.

The court properly refused to subject her property to the payment of the debt after McMahon had taken it up from Sinnett.

Judgment affirmed.

CASE 30—PETITION ORDINARY—OCTOBER 9.

Todd vs. Caplinger.

APPEAL FROM SHELBY CIRCUIT COURT.

1. Todd sold and delivered a horse in 1860 to Caplinger for $225, to be paid when Bell and Everett should carry the electoral vote of Kentucky. Bell and Everett then being candidates, did carry the electoral vote of Kentucky. Todd sued on the obligation, and also alleged an implied assumpsit to pay a reasonable price for the horse within a reasonable time. *Held*—that the contract was a bet on an election, and forbidden by law, and that, *as the law would not enforce the express contract, it would not imply one that could be enforced* for such a vicious and unlawful consideration. (*Commonwealth vs. Shouse*, 16 *B. Mon.*, 328.)
2. When the loser receives the thing bet, as the horse in this case, it is not forfeited to the Commonwealth. The act of March 6, 1854 (1 *Stanton.* 568), *section* 1, provides, that "*if the person winning shall receive the sum of money or other thing so bet*," * * * it "*shall be forfeited to the Commonwealth.*"
3. When a party deliberately enters into a contract or transaction forbidden by law, he cannot recover upon the express contract, nor will the law imply one for him.

C. M. HARWOOD, For Appellant,

CITED—

Act of March 6, 1854, *sec.* 1, 1 *Stanton*, 568.

18 *B. Mon.*, 122; *Love vs. Harris.*

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BULLOCK & DAVIS, For Appellee,

CITED—

Session acts, 1853–4, *page* 72.

18 *B. Mon.*, 122; *Love vs. Harris.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Todd sold and delivered to Caplinger a horse August 9th, 1860, at $225, to be paid for when Bell and Everett should carry the electoral vote of Kentucky, they then being candidates for President and Vice President of the United States. Bell and Everett did carry the electoral vote of Kentucky at the then pending election, and the horse not being paid for, Todd sued on said obligation February 20, 1867, to which Caplinger set up for defense that it was a bet upon an election and within the denunciations of our statute against the same; also, that the claim was barred by the statute of limitations. After which Todd filed an amended petition, going on the implied assumpsit to pay a reasonable price for the horse within a reasonable time, and averring his value to be $225; and, in avoidance of the statute of limitations, averred that some fifteen months after the delivery of the horse Caplinger departed out of the State to parts unknown to him, and entered the military service of the late "Confederate" government; to which Caplinger answered, denying that the horse was worth more than one hundred dollars; denying that he ever purchased said horse save as upon the event of Bell and Everett carrying the electoral vote of Kentucky; admitting that he had entered the Confederate military lines in September, 1861, and remained therein until March, 1865; but denies that this prevented Todd from suing, and relies upon the bar by time.

The evidence established the sale and delivery at two hundred and twenty-five dollars, and the promise to pay

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upon the event of Bell and Everett's receiving the electoral vote of Kentucky; and that the horse was worth not exceeding one hundred and fifty dollars; whereupon, the court, at Caplinger's instance, instructed the jury to find for him, and refused to instruct, at Todd's instance; that the sale, upon the event of Bell and Everett receiving the electoral vote of Kentucky, was no bar to his recovering the real value of the horse, nor was he barred by time.

The jury having found for defendant, and the court having refused to set aside the verdict, the plaintiff has appealed.

The first question is, was plaintiff barred by our statute of March 6th, 1854 (1 *Stant. Rev. Stat.*, 568), which provides for a fine upon both parties of one hundred dollars for betting on elections, as therein named; also, "*if the person winning shall receive* the sum of money or thing bet, * * it shall be forfeited to the Commonwealth;" and, by section 2, the fines and money or property recovered by indictment or suit, as therein provided, shall go—two thirds to the Common School Fund, and the remainder to the Commonwealth's Attorney.

It is contended, upon the authority of *Love vs. Harris* (18 *B. Mon.*, 122), that this horse was forfeited to the State, and that neither the horse nor his value could be recovered by Todd.

It will be observed that the forfeiture provided in said statute is upon the condition that the *winner* shall *receive* the thing bet; and such was the case in *Love vs. Harris;* but here it is the *loser* who has received the thing, to-wit: *the horse*, and the *winner* has received nothing. The statute does not forfeit the money or thing bet; if so, the property or money of both parties would be forfeited so soon as bet, without any regard to the event and determination as to which should be the winner.

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The policy of the statute is to fine each party for its violation, without regard to which be winner or loser; and then, in order to take all motive of its violation from the winner, to forfeit whatever he may have received as winner, else he might be able to pay the fine and still profit by violating the statute.

But, notwithstanding this horse was delivered by appellant to appellee upon an illegal and vicious *express contract*, which cannot be enforced, it is insisted that the *law will imply an assumpsit* to pay his reasonable value.

In *Commonwealth vs. Shouse* (16 *B. Mon.*, 328) this court held, "that a sale of property, to be paid for at its *fair value*, or at more than its fair value, in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value, as understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election."

In *Brown's adm'r vs. Langford's adm'r*, 3 *Bibb*, 500, this court said, that "where there is a condition or covenant to do several things, a part of which is against the common law and the rest lawful, the condition or covenant will be void as to so much as is unlawful, and good for the residue. But this doctrine does not hold where a part of the *consideration* is unlawful. *There is no question that a promise founded upon several considerations, one of which is vicious, is void;*" and the covenant being founded in part upon future concubinage, was held void. And in *Daniel vs. Daniel*, 6 *Dana*, 91, this court said, "it is unquestionably true, that if part of the consideration of a contract be illegal, or against sound morals or public policy, the whole contract is void, and no part of it can be enforced. *Ex turpi contractu oritur non actio.*" (*Chitty on Contracts*, 215–18.)

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In *Swan vs. Chandler and Phillips*, 8 *B. Mon.*, 98, in which Swan had feloniously bitten off Lanham's ear, and, in compromise of the cause of litigation, had paid Lanham money, and executed the note sued upon, this court said: "Whether, therefore, the right of Lanham to redress for the personal injury he sustained, did or not, form one of the elements of the contract between them, and constituted a portion of the consideration of the note sued on, is unimportant, if the other object contemplated by them, and which evidently formed the chief inducement to the agreement, was illegal," it being to stop the prosecution by indictment, and in which Lanham was not to appear as a witness, was held to be illegal and void.

Gardner vs. Maxey, 9 *B. Mon.*, 90, was a suit upon a note executed in consideration that Sturgeon would dismiss his action of assault and battery against Gardner, and would not appear as a witness before the grand jury to have an indictment found, it was held that the latter, being an illegal consideration, vitiated the whole contract, and the court said: "If, by entering into this illegal contract, the party injured should have precluded himself from all remedy for recovering compensation for the private injury which he may have sustained, he will have no right to complain that the attempted injury has recoiled upon himself," he having dismissed his private action; the court also saying, "the right of avoiding a contract, having for its object or consideration the defeat of the law itself, *is allowed not for the advantage of the party, but for the benefit of the public.*"

In *Collins vs. Murell* (2 *Met.*, 163), this court held, that a note given for borrowed money, a portion of which was loaned for the purpose of gaming, was held as void *in toto*, and this notwithstanding the money was loaned in Cincinnati to be used there, but the note executed in

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Kentucky. And in *Bull, &c., vs. Harragan, &c.* (16 *B. Mon.*, 352), where the plaintiffs sued the defendants for lightning-rods sold and delivered, which were the products of Pennsylvania, it being illegal to peddle such articles without a license, it was held the contract was void, and no recovery, either upon the express contract or for the value of the rods upon an implied assumpsit, could be recovered.

All of these cases show that when a party deliberately enters into a contract or transaction forbidden by law, he cannot recover upon the express contract, nor will the law imply one for him. It would indeed be singularly inconsistent for the law to denounce the express contract as illegal and vicious, and then turn around and imply one for the parties. Had the plaintiff in this case delivered the horse to the defendant at its real value, to be paid when Bell and Everett should carry Kentucky, this would have been a bet within the denunciations of the statute as decided in *Commonwealth vs. Shouse;* and the express contract vicious, would the law refuse to sustain the express contract to pay one hundred and fifty dollars, the real value of the horse, because of its illegality, and then raise an implied one to pay the one hundred and fifty dollars? The law is not thus inconsistent with itself. As heretofore said by this court, this plea is sustained for the public benefit and not the private advantage of the party. What might have been the aspect of the case had a creditor of Todd sued, we do not intimate; but he cannot recover.

Judgment affirmed.

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CASE 31—PETITION EQUITY—OCTOBER 10.

Moorman vs. Beauchamp.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. A denial in an answer, which is not such as the Code requires, dispenses with extraneous proof.
2. An affirmative allegation in an answer, that the lien attempted to be enforced by the plaintiff, had been waived, is not of itself proof of such alleged waiver.

JAMES WEIR, For Appellant.

SWEENEY & STUART, For Appellee,

CITED—

13 *B. Mon.*, 412; *Wilson, &c., vs. Soper.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The justice of this case is rather vexatiously obscured by the absence of all evidence, except what may be inferred from the petition and answer, on which alone the judgment was rendered in favor of the appellee as a substituted creditor of the partnership property.

The denial of his judgment and execution is not such as the Code required; and, therefore, the answer dispenses with extraneous proof.

The sale by the partner Fletcher of his interest in the firm may have waived his lien as partner, so as to preclude the appellee's subrogation thereto over Fletcher's individual creditors; but there is no proof of any such waiver of the lien of the other partner, Burks. The affirmative allegation to that effect in the answer is not itself proof, and is unsustained by any other evidence.

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Consequently, as there is no proof of any waiver of Burks' lien, the appellee appears to be entitled, by substitution, to the benefit of it; and, on this ground, the judgment seems to be right, and is, therefore, affirmed.

CASE 32—PETITION EQUITY—OCTOBER 10.

Harrison vs. Griffith, &c.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. A widow is entitled to dower in what remains of the proceeds of the sale of a house and lot, to which her husband held an equitable title at his death, after satisfying a vendor's lien, and also satisfying an execution lien in favor of the Commonwealth against him as sheriff, to satisfy which he had surrendered the house and lot in writing.
2. A surrender in writing of real estate, to be levied upon and sold to satisfy an execution, must be regarded as so far an alienation of the equitable title.
3. Dower in money is directed to be set apart by requiring the widow to give bond for its return at her death, or by paying her absolutely the present value of her dower interest, to be estimated according to the American annuity and life tables, taking into consideration her age, health, and probable duration of life.

RAY & HARDIN, For Appellant,

CITED—

Revised Statutes, sec. 3, 2 *Stanton*, 262.
4 *Mon.*, 339; *Tevis vs. Steele.*
12 *B. Mon.*, 266; *McClure vs. Harris.*
Revised Statutes, art. 15, *chap.* 36, 1 *Stanton*, 488.

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SWEENEY & STUART, For Appellees,

CITED—

18 *B. Mon.*, 113; *Gully vs. Ray.*
16 *B. Mon.*, 117; *Heed and wife vs. Ford.*
3 *Met.*, 349; *Moore vs. Simpson.*
4 *J. J. M.*, 589; *Major vs. Deer.*
2 *B. Mon.*, 256; *Read vs. Hensley.*
Revised Statutes, sec. 6, *art.* 12, *chap.* 83.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Warfield had sold to J. G. Harrison, the husband of appellant, a house and lot in Owensboro, and gave his title bond for a conveyance on the payment of the remaining purchase price of one thousand five hundred dollars.

Harrison was the sheriff of Daviess county, and became a debtor to the Commonwealth, which was reduced to judgment, and execution issued thereon and placed in the proper officer's hands for collection, when Harrison surrendered, in writing, said house and lot, to be sold in satisfaction thereof, which the sheriff sold, subject to the outstanding purchase price, when Griffith purchased it at three thousand and eighty-seven dollars and fifty cents, and afterwards purchased Harrison's note to Warfield for the unpaid purchase price; subsequently to which, he filed a petition, under our statute, setting out all these facts, and asserting his legal lien for both sums, and asking a judgment of sale from the chancellor. He also presented various other claims which Harrison owed him, but upon which Harrison had never surrendered the house and lot to be sold. Judgment by default was rendered on all these claims, and a sale of the house and lot ordered. The commissioner did sell, and Griffith again became the purchaser at four thousand two hun-

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dred dollars; after which, and before any confirmation of the sale, Harrison died, and his widow and heirs were, by amended petition, made parties, when she came in and claimed dower, but which the court adjudged against her, and of which she complains.

It is well settled that she is not entitled to dower as against the vendor's lien of one thousand five hundred dollars.

The execution for two hundred and forty-four dollars and seventy-seven cents, and four hundred and fifteen dollars and fifty-seven cents, due the Commonwealth, upon which Harrison surrendered the house and lot to be sold, was not only a lien claim by virtue of our statute (2 *Stant. Rev. Stat.*, 262), but his surrender in writing must be regarded as so far an alienation of the equitable title; but only so far. His surrender to pay the debts due the Commonwealth was not a surrender to pay debts not then in execution, nor in the officer's hands. Neither was the judgment of sale by the chancellor, nor the commissioner's sale thereunder, until confirmed, and the deed made in pursuance thereof, an alienation of the equitable title; therefore, the widow and heirs were essential parties to the suit before the court could consummate Griffith's inchoate purchase at the commissioner's sale, he then only standing as a preferred bidder.

It is an inevitable result, therefore, that as Harrison died seized of the property, his widow is entitled to be endowed after the payment of the preferred vendor's liens and the debts due the State. As the property is presumed to be indivisible, and was properly sold, she will be entitled to the use for life of one third of the remaining purchase money, by giving bond with security, to be approved by the court, for its return at her death, which the court from time to time may cause to be renewed, or

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may invest it and pay its proceeds to her, else pay her absolutely what her dower interest is worth, rated by the American annuity and life tables, taking into consideration her age, health, and probable duration of life.

Wherefore, the judgment is reversed, with directions for further proceedings as herein indicated.

CASE 33—PETITION EQUITY—OCTOBER 10.

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Johnson vs. Parker, &c.

APPEAL FROM KENTON CIRCUIT COURT.

1. A citizen of Ohio made to another citizen of that State a voluntary deed, assigning all his estate, debts, &c., everywhere, for the payment of all his own debts, without discrimination or preference, according to the laws of Ohio regulating assignments by "*insolvent debtors.*" After the date of the assignment, Kentucky creditors, in the courts of Kentucky, attached a debt due by a citizen of Kentucky to the non-resident insolvent. The attaching creditors never acceded to the assignment. *Held*—That in the courts of Kentucky the attachment liens have preference over the title and claim of the assignee.
2. *Resident creditors*, having attached a debt due by a citizen of Kentucky to an insolvent debtor of Ohio, *have preference* in the courts of Kentucky over the assignee of such insolvent debtor, although the assignment was made in Ohio before the attachments were sued out in Kentucky.
3. The principle of comity does not require the courts of one State to recognize and enforce, to the prejudice of its own citizens, assignments made by insolvent debtors under the laws of another State; but they will secure justice to domestic creditors, without regard to the foreign law and assignment.

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F. M. Webster, For Appellant,

CITED—

Revised Statutes of Ohio, vol. —, chap. 57, p. 709.
American Law Register, vol. 6, p. 522, 1866–7.
17 *Penn. R.*, 91.
1 *Wallace, jr.*, 131; *Caskie vs. Webster.*
23 *N. Y. Rep.*, 224; *People vs. Commissioners of Taxes.*
1 *Duvall*, 360; *Lehmer, &c., vs. Kerr, &c.*
1 *Duvall*, 186; *Bibb vs. Tomberlin, &c.*
2 *Metcalfe*, 530; *Newby & Taylor vs. Hill & Miller.*
17 *B. Mon.*, 625; *Forepaugh, Bishop, &c., vs. Appold & Sons.*

Stevenson & Myers, For Appellees,

CITED—

2 *Kent's Com.*, 8*th ed.*, 404–9, *top p.* 522–27.
6 *Johnson's Ch'y R.*, 460; *Holmes vs. Runsen.*
20 *Johnson's Ch'y R.*, 254.
12 *Wheaton*, 213; *Ogden vs. Saunders.*
5 *Cranch*, 289; *Harrison vs. Storry.*
17 *Howard*, 322; *Booth vs. Clark.*
15 *Pickering*, 11; *Fall River Iron Works vs. Croad.*
13 *Mass.*, 146; *Ingraham vs. Geyer.*
3 *Wend.*, 538; 23 *Wend.*, 90.
1 *Har. & McH.*, 236; *Burk vs. McClain.*
2 *Har. & McH.*, 463; *Wallace vs. Patterson.*
6 *Binney*, 353; *Milne vs. Marton.*
1 *Penn.*, 117; *Mulliken vs. Aughinbaugh.*
2 *Watts & S.*, 129; *Lowry vs. Hall.*
50 *Penn.*, 230; *Philson vs. Barnes.*
2 *Haywood*, 24; *McNeil vs. Calquhoon.*
Const. Rep. (*S. C.*), 283; *Topham vs. Chapman.*
4 *McCord*, 519; *Robson vs. Crowder.*
3 *Ohio*, 488; *Rogers vs. Allen.*

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32 *Vermont*, 460; *Rice vs. Curtis.*
Kirby's Rep. (*Conn.*), 313; *Taylor vs. Geary.*
3 *Martin's* (*La.*) *R.*, 676; *Mitchell vs. McMillan.*
14 *Martin's* (*La.*) *R.*, 93; *Ohair vs. Townes.*
4 *Pickering* (*Mass.*), 265; *Borden vs. Sumner.*
6 *Pickering*, 286; *Black vs. Williams.*
35 *N. Y.*, 8 *Tiffany*, 657; *Guillander vs. Howell.*
Revised Statutes, 1 *Stanton*, 280.
Civil Code, secs. 228, 229, 231, 221.
23 *Wendell*, 87; *Johnson vs. Hunt.*
Story's Conflict of Laws, 469.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On the 26th of January, 1867, George C. Glass, of Cincinnati, Ohio, made to Edgar M. Johnson, of the same place, a voluntary deed, assigning all his estate, including all his debts and choses in action everywhere, for the payment of all his own debts, without discrimination or preference. The conveyance was authenticated and filed in the probate court in that city, and the trust accepted according to a statute of Ohio regulating assignments by "*insolvent debtors.*"

A few days after the date of that assignment, the appellees, Parker and Bedinger, citizens of Kentucky, and each a creditor of Glass, filed separate petitions in equity for attaching a debt of about six hundred dollars due to him by Ransom, another citizen of Kentucky. These suits being consolidated, Johnson intervened, and asserted a prior and paramount title as assignee of the attached debt.

On the hearing, the circuit court adjudged the payment of the debt to the attaching creditors; and the assignee appealed.

Ransom's debt having no *situs*, except for attaching creditors, there can be no doubt that the assignment to

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Johnson passed to him an ostensible, equitable title to it; and the only question in this case is, whether that title shall, in the tribunals of Kentucky, be preferred to the equitable lien of the attaching creditors in Kentucky.

British authority gives effect everywhere to a legal assignment in England of a bankrupt's estate; but the American doctrine is antipodal. The American judiciary has authoritatively adjudged that, as local bankrupt laws have, *proprio vigore*, no extra territorial operation, the principle of international comity does not require the courts of one government to recognize and enforce, to the prejudice of their own fellow-citizens, such assignment, by the law of another and foreign government, but that they will secure, as they ought and may, justice to domestic creditors without regard to the foreign law and assignment.

If this American principle apply to a voluntary assignment by an insolvent debtor, the judgment in this case cannot be gravely questioned. The difference between an assignment by law which is local, and an assignment by contract which is ubiquitous, is obvious and radical; and if the circumscribed operation of a *law* assigning an insolvent's estate be the only reason for the American doctrine of comity respecting such assignments, that essential difference would be decisive of this question. But the difficulty, uncertainty, and cost of obtaining just distribution by domestic creditors in a foreign country, and their right to protection by their own government, when necessary and rightful, may be another reason authorizing the same conclusion. Whether this be so or not, we are not instructed by American adjudications to say. While we find some few *obitur dicta*, we have neither been referred to, nor have seen any direct judicial decision on this subject. In this unsettled state of the

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matter, this court, whatever may be its own impression, will prudently abstain from unnecessarily reasoning or hazarding the expression of a judicial opinion upon it; for, however that might be decided, there is at least one other ground which we deem decisive of the case before us.

The appellees never acceded to the assignment, but oppose it; nor is there any proof of foreign creditors, or of their accession. Nor is it shown that the abstraction of the litigated fund from Kentucky is necessary for paying any other creditors than the appellees.

Moreover, to secure fidelity and justice in all cases of conveyance in Kentucky to trustees for the benefit of creditors, an act of 1860 (*Mycrs' Supp.*, 533) forbids any such trustee to proceed, in any way, to execute the trust until he shall have executed a prescribed bond. And duty to our own citizens, who are creditors of a foreign assignor, still more imperiously requires the like security from the foreign trustee. No such bond has been executed in this case, and the appellees have not the security for just distribution which they might require if the appellant had been a domestic trustee. Comity should require reciprocity.

Then, the case thus standing before us, we cannot adjudge that it was the duty of the circuit court to give the appellant priority, and authorize him to take from Kentucky and her own creditor citizen's money, over the appropriation of which her courts could have no control after its transportation to Ohio, and where it may neither be necessary for distribution nor be distributed in such manner as to do justice to her own citizens. Such ultra and suicidal comity could not be required or expected of any patriarchal and provident sovereign.

Wherefore, the judgment is affirmed.

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CASE 34—PETITION EQUITY—OCTOBER 12.

Clay and others vs. Nicholas County Court, &c.

APPEAL FROM NICHOLAS CIRCUIT COURT.

Subscriptions of one thousand dollars per mile to turnpike roads in Nicholas county, by the county judge, under the act of February 9, 1864, and acts amending said act, *were unauthorized and void*, it being admitted that an amount of stock sufficient, with the aid of said county subscription, to complete each mile of road to which such county subscriptions applied, *had not been taken by private subscription, as required by said acts.* The circuit court erred by dismissing the petition of tax-payers for an injunction to enjoin any payment or levy on account of such unauthorized and void subscriptions.

KIDDOO & ROSS, For Appellants,

CITED—

Session Acts, 1865–6, *page* 64.
Session Acts, 1863–4, *page* 358.
Act of February 9, 1864.
Session Acts, 1866–7, *vol.* 2, *page* 198.
9 *B. Mon.*, 330; *Chancy vs. Hooser.*
13 *B. Mon.*, 33; *Slack, &c., vs. Lex. and M. R. R. Co.*

STANTON & THROOP, For Appellees,

CITED—

Acts of 1867, *vol.* 2, *page* 198.
Session Acts, 1864, *page* 358.
Session Acts, 1865–6, *pages* 411, 412.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The county court of Nicholas county chartered two turnpike roads, to run through the same neighborhood, from Carlisle to Jackstown, and the county judge having

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subscribed stock in each of them, a levy was made on the taxable property of the county for raising the amounts subscribed; and, after collecting a portion of that tax, the sheriff was ordered to pay one thousand five hundred dollars to the use of one of those roads. To enjoin that payment, and any other payment or levy on account of either of those subscriptions, the appellants, as fifty citizens and principal tax-payers of said county, for themselves and their fellow-citizens, too multitudinous to be made formal co-parties by name, filed a petition in equity, charging that two parallel roads, so nearly contiguous as the average distance of half a mile, would be unnecessary, and unable to support themselves, that the tax would be unjust and oppressive, and that the charters, subscriptions, and levy were irregular and illegal. The circuit court having refused an injunction, and sustained a demurrer to the petition, the appellants seek a reversal of that judgment.

Neither the policy nor the moral justice of the charters is cognizable by this court, and the Legislature, by a curing act, legalized the charters so far as it had power to do so.

We will, therefore, consider only the legality and validity of the subscriptions by the county judge.

An act of February 9th, 1864, authorized a majority of all the justices of Nicholas county court to subscribe not exceeding seven hundred and fifty dollars a mile to any chartered turnpike in this county, "provided, that such subscriptions shall not be made until said court shall be satisfied that an amount of stock sufficient, with the aid of said county subscription, to complete each mile of road to which such county subscriptions apply, has been taken by private subscription."

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A subsequent act of February 9th, 1866, modified that of 1864, but only so far as to substitute the county judge for the justices, and enlarge the authority to one thousand dollars a mile. Private subscriptions to an amount which would be sufficient, with the public subscription, were still indispensable to the special authority of the court to bind the county by its subscription.

The only unrevoked subscription applicable to this case was made by the county judge on the 13th of August, 1866, for one thousand dollars a mile, without any suggestion about individual subscriptions, or any apparent consideration of that indispensable prerequisite. Apparently, therefore, the subscription was unauthorized, and, consequently, void. But however the fact of any such private subscriptions, and the extent of them, might have actually stood out of the record, the petition charges that the aggregate of them, if all available, lacked at least five thousand dollars of the requisite amount for authorizing the county subscription. And this decisive fact was admitted by the demurrer, which, therefore, ought to have been overruled.

Consequently, the circuit court erred in sustaining the demurrer, and, without answer, dismissing the petition of the appellants, which, if true, entitles them to the relief sought by it.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings.

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CASE 35—PETITION EQUITY—OCTOBER 12.

Blair, &c., vs. Carlisle and Jackstown Turnpike Company.

APPEAL FROM NICHOLAS CIRCUIT COURT.

A sheriff, who collected money by illegal taxation on a void subscription to turnpikes, holds the same as a trust fund for the benefit of the tax-payers who contributed that fund. (*See case next preceding this.*)

W. P. Ross, For Appellants,

CITED—

18 *B. Mon.*, 621; *Todd vs. Caincs.*

3 *Mct.*, 347; *Terrill vs. Cecil.*

4 *Mct.*, 25; *Thompson vs. Healy.*

Revised Statutes, secs. 5, 6, *art.* 2, *chap.* 26.

STANTON & THROOP, and
T. N. & D. W. LINDSEY, For Appellee,

CITED—

Session Acts, 1863–4, *p.* 358, 1865–6, *vol.* 1, *p.* 411, 1867, *vol.* 2, *p.* 198.

MSS. Opn., January, 1857; *Weaver, &c., vs. Bracken County Court.*

Revised Statutes, sec. 5, 1 *Stanton*, 298.

4 *Mct.*, 258; *Thompson vs. Healy.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT.

As a legal sequence of the decision just rendered in the foregoing case, the sheriff of Nicholas county holds the money collected by illegal taxation on a void subscription to turnpikes as a trust fund for the benefit of the tax-payers who contributed that fund.

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The circuit court, therefore, erred in its judgment in this case against the sheriff and surety for refusing to pay one thousand five hundred dollars of that fund to the use of one of those turnpikes. The sheriff ought to hold that money until otherwise appropriated legally.

Wherefore, the judgment is reversed, and the cause remanded for proper disposition conformably with this opinion.

CASE 36—PETITION EQUITY—OCTOBER 13.

Wells, &c., vs. Newton, &c.

APPEAL FROM OHIO CIRCUIT COURT.

Testator devised that the residue of his estate should be equally divided between his children, *individualized by their respective names*, and his *grandchildren* by a deceased daughter, *designating them also by their names*. For equalization among each and all of his devisees alike, without any discrimination, the testator bequeathed to each of his two grandchildren special legacies the same as he had given to each of his children. *Held*—That under this will, each of the grandchildren took the same as a child; that children and grandchildren must be understood as used for identifying the persons specially named, and not for qualifying the interest of each grandchild more than that of each child.

H. D. TAYLOR, For Appellants.

SWEENEY & STUART, For Appellees,

CITED—

5 *J. J. M.*, 353; *Luke vs. Marshall, &c.*

11 *B. Mon.*, 32; *Lochland's heirs vs. Downing's ex'rs.*

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JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The parties in this case submitted to the circuit court a precautionary petition for a judicial interpretation of the will of James Newton. The court construed so much of the will as concerns two grandchildren of the testator so as to entitle each of them representatively to only half of a child's part, and they appeal.

So much of the will as essentially applies to the question submitted for our revision provides, that, after a small legacy to the testator's surviving wife, the residue of his estate, movable and immovable, including the homestead of about four hundred acres inherited by her, should be divided equally between his children, *individualized by their respective names*, and his grandchildren by a deceased daughter, *designating them also by their names*—"*Angelia Wells and Jerome Wells;*" and subjoining the following bequests: "That those of my children who have not received one bed, bedstead, and bedding, one cow and calf, sow and pigs, and one horse, shall have them out of my estate, *to make them all equal.* I *expressly* direct that my grandchild, *Angelia Wells, above named*, shall have one bed, bedstead, and bedding, one cow and calf, one horse, and sow and pigs; and that *Jerome Wells* shall have one bed, bedstead, and bedding, one sow and pigs, and one cow and calf."

Had the classification of "*children*" and "*grandchildren*" been omitted, and the devise had been to the same persons by their names only, each of them would certianly have taken *per capita* equal portions; but "children" and "grandchildren" must be understood as used for identifying the persons specially named, and not for qualifying the interest of each grandchild more than that of each child. This apparently logical conclusion is fortified by the significant fact that, *for equalization among*

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each and all of the devisees alike, without any discrimination, the testator, with emphasis, bequeathed to *each* of his two grandchildren the same special legacies of cows, calves, bed, &c., which he gave to each of his children, excepting only that a horse was pretermitted in the bequest to Jerome, and which is not material to the general conclusion, and might be consistently accounted for by the not improbable presumption that a horse or its equivalent had already been advanced to Jerome.

The assumed unreasonableness of giving to a grandchild as much as to a child cannot control or neutralize the construction of the testamentary language. In many cases it might be unreasonable not to do so. Jacob thought so as to Ephraim and Manassa; and there may have been as satisfactory reasons in the case now litigated as there were in the more illustrious precedent christalized in the Bible. We can suppose cases in which equal distribution among children and some grandchildren would be natural and just.

Nor is the legal construction of the principal devise affected by the fact that, if the homestead had not been devised, it would have descended as the estate of the testator's widow; and then, that each grandchild would have been entitled to only half as much as each child would have inherited. The devisees have not renounced the devise, and claimed that tract as heirs; and the testator, asserting the right to dispose of it, has chosen to divide it equally between each of his children and grandchildren; and, if his will stand, that purpose must also stand.

Wherefore, the judgment is reversed, and the cause remanded for a construction conformable with this opinion.

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CASE 37—PETITION EQUITY—OCTOBER 15.

B. C. Ramage vs. Clements & Gilmore.

APPEAL FROM FULTON CIRCUIT COURT.

1. Having recovered a judgment by default, in 1859, against a minor for whom no defense was made, the plaintiffs, in 1865, voluntarily caused the action to be again placed on the docket, and summons served on the defendant to answer, &c. The defendant answered and defeated the action. These subsequent proceedings must be regarded as a voluntary release and abandonment of the previous judgment of 1859, which plaintiffs cannot afterwards, at their option, vivify and enforce by execution.
2. Although the court had no power, of itself, to reinstate the action on the docket, and set aside the former judgment in favor of the plaintiffs, and retry the cause, still, by agreement of parties, the court might allow it to be done, and especially when the former judgment was voidable. The action being defeated on the second trial, the former judgment cannot afterwards be enforced by execution. In this case the circuit court erroneously refused an injunction against the enforcement of the former judgment.

RANDLE & TYLER, For Appellant,

CITED—

Civil Code, secs. 55, 14, 421, 579.
1 *Duvall*, 349; *Thornton vs. McGrath.*
18 *B. Mon.*, 558; *Pond vs. Doneghy.*
3 *Mct.*, 424; *Smith vs. Ferguson.*
MSS. Opn., June, 1857; *Tribble vs. Chilton.*
1 *Duvall*, 254; *Beverly vs. Perkins.*

ROULHAC & LAUDERDALE, For Appellees.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

It is alleged in the petition that appellees recovered judgment against appellant at the September term,

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1859, by default in the court below, and as to H. C. Ramage, a co-defendant, on whom process was not executed, the action was continued; and at the September term, 1860, of said court, judgment was rendered against his co-defendant, and the cause went off the docket. That afterwards appellees had it put on the docket again; and at the March term, 1861, judgment was set aside, and another judgment rendered against H. C. Ramage. That nothing further was done in the case until the latter part of the year 1865, or early in 1866, when appellees had the cause again put on the docket, a summons issued commanding him to appear at the March term, 1866, of said court, and answer to the action; that he appeared at the time designated, answered the action, denied he had ever executed the note sued on, and denied that he was indebted to appellees in one cent. Upon the issues thus made, the parties went to trial, introduced their evidence, and judgment was rendered in favor of appellant.

That after said trial and judgment in his favor, appellees caused an execution to be issued on the judgment recovered in 1859, and the same was levied on his property. He alleges that he never executed the note on which the suit was brought, and when the judgment was rendered in 1859 he was a minor, under twenty-one years of age, and that said judgment was rendered against him without defense having been made for him, either by statutory guardian or guardian *ad litem;* and prays for an injunction against appellees, and that they be perpetually enjoined from proceeding on said judgment. On demurrer, his injunction was dissolved and his petition dismissed, and he (B. C. Ramage) asks a reversal of that judgment.

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Appellees unquestionably had the power to release their judgment against appellant; and having done so, they would have no right afterwards to enforce it by execution. And although, after judgment had been rendered, and the cause dismissed, the court, at a subsequent term, had no power, of itself, to reinstate it on the docket, set aside the former judgment, and retry it, still, by agreement of parties, the court might allow it to be done, and especially in a case where the judgment was voidable.

Here, it is alleged, that appellees voluntarily had the cause placed on the docket, and another summons issued; appellant was served with the process of the court; appeared, answered, and defeated them in a trial to which they had invited him, which are to be taken as true on demurrer. Can they now retreat from that defeat, disregard the last judgment, and enforce the previous one which was voidable in its inception, and to which, as the subsequent trial shows, they were not entitled? We think not. The subsequent proceedings must be regarded as a voluntary release and abandonment of the previous judgment by appellees, which they cannot afterwards, at their option, vivify and enforce by execution.

The allegations of the petition uncontroverted entitled appellant to the relief he sought.

Wherefore, the judgment is *reversed*, and the cause is remanded, with directions to overrule the demurrer to the petition, and for further proceedings consistent herewith.

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CASE 38—PETITION EQUITY—OCTOBER 15.

Green vs. Johnson, &c.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. "I authorize and request my executors to make conveyances for all lands I have sold * * * when the purchase money is paid, and to sell and convey all my lands except" * * * The proceeds of the land sold, and the land requested to be sold, were bequeathed to the separate use of testator's three daughters. One of these daughters married and died childless, without having elected to keep the land requested to be sold. *Held*—That the husband of this daughter, who sued as her administrator, is entitled as such, if not in his own right, to recover her share of the proceeds of all the lands referred to in the above clauses of the will, whether it had been sold or was therein requested to be sold, and the unsold land is required to be sold for distribution.
2. "*I authorize and request my executors*" *to sell lands;* the mere authority to sell could not have been a constructive conversion, but the superadded "*request*" *was mandatory;* such request is synonymous with *require*, or *direct*, or *order*. Whatever a testator expresses *as his will*, is legatory; and if that will is unqualified, the executors have no right to refuse its fulfillment.
3. A request to executors to convert certain lands into money *is, in equity, a conversion, and the legatees took money instead of land*, and when the legatee died childless, without electing to keep the land, or being competent to so elect, her interest in the unsold land *was not realty but personalty*, which went to her husband, or to him as her administrator.

RAY & HARDIN, For Appellant,

CITED—

Williams on Executors, page 88, *and note v.*

14 *B. Mon.*, 554; *Loughborough vs. Loughborough.*

6 *B. Mon.*, 37; *Christler's ex'r, &c., vs. Meddis, adm'r.*

3 *Met.*, 372; *Hooker, &c., vs. Gentry, &c.*

1 *Jarman on Wills*, 524, 525, 756.

2 *Bush*, 158; *Rawlings' ex'r, &c., vs. Landes.*

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W. N. SWEENEY, For Appellees,

CITED—

Story's Equity Juris., sec. 1214.
4 *B. Mon.*, 253; *Samuel vs. Samuel, &c.*
7 *Dana*, 11; *Clay & Craig vs. Hart.*
3 *Wheaton*, 564; *Craig vs. Leslie.*
9 *B. Mon.*, 323; *Burnside's adm'r vs. Wall.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In the year 1852 Philip Triplet, of Daviess county, Ky., died, leaving three children, Harriet N. Johnson, wife of the appellee, J. L. Johnson, Laura Triplet, and Philippa Louisa Triplet, and a published will, whereby, after several specific legacies to those daughters, he made the following testamentary provisions: "All the rest and residue of my estate, not otherwise directed, I devise and *require* to be equally divided among my three above named daughters, for their own use and benefit, and with that herein devised is not to be, in any manner or way, subject to the payment of their husbands' debts, as my object is to secure my estate to my daughters, for their support and maintenance, which I believe can legally be done without the intervention of a trustee; but if it cannot, then I appoint my friend, James Weir, trustee for my three daughters, to hold the whole estate devised to them, in trust for the purposes named in this will."

"I authorize and *request* my executors to make conveyance for all lands I have sold and given bonds for the conveyance of, either in conjunction with W. R. Griffith or his executors or otherwise, when the purchase money is paid; *and to sell and convey all my lands*, except my plantation, containing about four hundred and thirty acres, and the one hundred and twenty-five acres between A. Stout's and Mrs. Protsman."

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Laura Triplet died an unmarried infant; and in the year 1862 Philippa L. Triplet intermarried with the appellant, John D. Green, and during the same year died childless.

The executors never having sold any land, but having collected the amount of notes held by the testator for lands sold by him on the Cumberland river, the appellant, in January, 1865, brought this suit in equity for a settlement of the estate, and for one half of the sum collected for lands sold, and of the proceeds of the sale of lands requested to be sold, a decree for compelling the executors to sell, which he prayed as his wife's administrator.

The answers denied the appellant's right to either any portion of the money collected for lands sold by the testator, or to a sale of any of the unsold lands; and, on the final hearing, all other matters having been adjusted, the court dismissed the petition, and adjudged the unsold land and the proceeds of the lands sold by the testator, to Mrs. Johnson.

As the proceeds of the sold lands on Cumberland belonged to the appellant's wife at her death, we can perceive no reason why the appellant, as her administrator, if not in his own right, was not entitled to that fund. And whether he has the like right to require a sale of the lands which the executors were requested by the will to sell, and to demand, as he does, one half of the proceeds, depends on the proper answer to the question—did the will make an equitable conversion of those lands into money? And this is the only question we shall consider. If, instead of devising the title to his three children, and merely requesting a sale of the lands, the testator had devised it to the executors, and peremptorily ordered them to sell, it is admitted that, as to that interest, it was money bequeathed, and not land devised.

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Nevertheless, if the will concerning the sale must be construed as mandatory, the testator must be presumed to have intended a conversion of the land into money as best for the testamentary beneficiaries. And his intention, if clearly manifest for such conversion, made the land money to the legatees.

A mere authority to sell could not have been a constructive conversion; but the superadded "*request*" to sell was constructively mandatory, because the unqualified request was the testator's *will*, and left no discretion not to sell. Authority, analogy, and reason allow no escape from this conclusion. Whatever a testator expresses *as his will* is legatory; and if that will is unqualified, the executors have no right to refuse its fulfillment. Such "request" is synonymous with "require," or direct, or order. And we see nothing in the context or spirit, or pervading purpose of Triplet's will, to control that interpretation. His evident design to secure the estate to the use of his daughters, free from the debts of their husbands, does not imply that he intended to preclude the husbands from any interest during the lives of their wives, or after their deaths; nor does it imply that the testator thought that his aim would be more certainly accomplished by retaining the land than by converting it into money intrusted to the separate use of his daughters, to be secured through James Weir as trustee, if a trustee should be necessary for that purpose. On the contrary, the testator, on deliberate consideration, seemed to think that his provident end of the best interest and security of his daughters would be most advantageously attained by converting certain land into money; and, for that purpose, he requested his executors to make the conversion. This, in equity, was conversion itself, and, therefore, to that extent, the daughters took money instead of land;

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and when the appellant's wife died, without electing to keep the land, or being competent so to elect, her interest in that land was not realty but personalty, which went to the appellant as husband or as administrator.

We must, therefore, adjudge to him one half of the proceeds of the sale of the Cumberland land, and also of the sale hereby directed to be made of the lands devised to be sold.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded for proceedings and decree conformable with this opinion.

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CASE 39—PETITION EQUITY—OCTOBER 16.

Worley vs. Tuggle, &c.

APPEAL FROM WHITLEY CIRCUIT COURT.

1. When land is purchased by parents and conveyed to their minor children, the latter are mere volunteers, and stand in no more favorable attitude and have no higher equities than the parents would have had, if the land had been conveyed to them.
2. When, by mistake, oversight, or fraud, the deed or written memorial does not conform to the real contract of the parties, the chancellor can reform the deed or written memorial on satisfactory parol evidence, and then enforce a specific performance according to the real contract. In all such cases if the mistake, oversight, or fraud is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties, and then enforce it.
3. No one can be compelled to convey lands unless the sale be attested by a writing. When, however, a contract of sale is so attested, though through fraud, omission, or mistake, the real sale, as made, is not set

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forth, the current of American authorities recognizes the power and duty of the chancellor to reform the writing and enforce it, when certainly coming within the provisions of the statute of frauds and perjuries; but when not coming within the statute, there is no contrariety of adjudicated authorities in England or America, for it then falls within the general jurisdiction of the chancellor to correct for fraud, omission, or mistake, unqualified by the statute, and justified by the same exceptions to that rule of evidence which recognizes written as higher and more reliable than parol testimony.

4. It was agreed that the vendor should have a lien for the unpaid purchase money; the draftsman was so instructed to write the deed, and he and the parties thought it was so written; but, in matter of fact and law, it was not so written. On the evidence of the draftsman the deed is reformed so as to reserve the lien, and then the lien is enforced.

5. The evidence of the draftsman alone, since the adoption of the Civil Code, is sufficient to establish the allegation of *mistake*, though denied in the answer. (*Civil Code, sec.* 142.)

6. The rule which required two witnesses or one witness, and strong corroborating circumstances, to overcome a denial in an answer in chancery, has been changed by the Civil Code, section 142. (*Albro vs. Lawson*, 17 *B. Mon.*, 644; *Enders vs. Williams*, 1 *Met.*, 354–5.)

7. The statute requires the amount of unpaid purchase price to be specified in the deed of conveyance, else the vendor's lien is thereby waived; but as between the original parties or volunteers under them, this was never intended either to work a fraud or to alter the rules of evidence, nor to take from the chancellor one of his most valuable jurisdictions.

8. In the reformation of deeds, the just rights and equities of third and innocent parties, purchasers for a valuable consideration without notice, are not to be disturbed; for, as between vendor and innocent remote vendees, the loss should fall on the one who, through his own negligence, may, to some extent, be regarded as the author of the misfortune.

A. J. James, For Appellant,

CITED—

1 *Met.*, 359–61; *Scales vs. Ashbrook.*

1 *Story's Equity, sec.* 134.

9 *B. Mon.*, 210; *Wolfe vs. Bate.*

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3 *B. Mon.*, 513; *Ray & Thornton vs. Bank of Kentucky.*

4 *Paige*, 355; *Gates vs. Green.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE MAJORITY OF THE COURT, JUDGE ROBERTSON DISSENTING:

It is a well-established and undoubted fact, that when the vendor contracted the land to Jane Early and Henry Tuggle, and agreed to convey it to their children, Marshall Early and John Tuggle, a lien was to be reserved for the unpaid purchase price, and both contracting parties instructed the draftsman to so draw the deed as to secure this lien; and when he had drawn it, he then assured the parties that the language used did secure such lien, it stating the amount of the consideration, "*paid and to be paid*," without specifying how much remained unpaid, all fortified by the then insolvency of Henry Tuggle, who died soon after wholly insolvent.

This language, before our revision, would have secured the vendor's lien; but since the revision of our statutes, no vendor's lien is secured when the title is conveyed, "*unless it be expressly stated in the deed what part of the consideration remains unpaid.*" (2 *Stant. Rev. Stat.*, 230.)

Both the notes sued upon are dated the same day of the deed, and one recites that it is given in part pay for a certain tract of land this day deeded to John Tuggle and Marshall Early.

As the vendor seeks to reform the deed, and then enforce his lien, it presents the single question of legal power in the chancellor to do so.

This case presents a mutual mistake of law and fact by both the contracting parties and draftsman; and though the land was conveyed to the minor children of the purchasers, yet, as they are mere volunteers, they stand in

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no more favorable attitude, nor have they higher equities, than if it had been conveyed to the parents.

Whatever may be said as to the danger of admitting parol or extraneous evidence to contradict, alter, or add to written instruments, it is now settled, by such an overwhelming current of authority, both in the American States and England, that this may be done when, through mistake, oversight, or fraud, the written memorial does not truly set out the contract, as scarcely to be regarded as longer an open question. But all the authorities agree that such evidence is to be cautiously received, and the case clearly made out, else the courts should hold to the written memorial as the highest and best evidence of the contract; but when it thus does appear, the written memorial, instead of attesting an agreement voluntarily entered into by the contracting parties, makes for them a bargain which the mind of neither party ever assented to, and to hold the injured party bound would simply make a rule of evidence, intended to secure justice, instrumental in perpetrating the grossest fraud.

After a long struggle, in which honesty, good faith, and integrity were attempting to free the administration of justice from fraud, chicanery, and unconscientious advantages, to be obtained through a too strict adherence to a very salutary rule of evidence, the true philosophy of the rule was determined perfectly consonant with the just stability of written instruments and the strictest integrity, by admitting the above named exceptions. But as those willing to avail themselves of unconscientious advantages are always seeking, with watchful vigilance, to secure such benefits, by either rules of property or of evidence, the next great struggle in which integrity, honesty, and fair dealing had to meet the same wary, watchful chicanery, in attempting to protect its uncon-

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scientious advantages under the rules of law, was upon the statute of frauds and perjuries, which substantially declare, among other things, that no suit should be brought against *the party to be charged for any sale of real estate, &c., unless upon some memorandum, in writing, signed by him.*

The developing science of the law, and its ever-waxing love of justice, increasing the omnipotence of the chancellor for equitable purposes, soon settled that this statute in nowise modified the above named exceptions to the rule of evidence, nor curtailed the equitable jurisdiction of courts.

But still, with more plausibility and seeming adherence to law, it was contended that even when, by mistake, oversight, or fraud, the deed of conveyance did not conform to the real contract of the parties, that all the chancellor could do would be to cancel the deed, and put the parties in *statu quo;* that to reform the deed, and then enforce a specific performance, would be to render the statute nugatory, whilst it was conceded that any unfair provision inserted for the vendee's benefit, not according to the contract, could be modified, and the deed made to conform to the real intention of the parties; yet, when any advantageous covenant in his favor had been left out, that the chancellor was powerless to enforce it, thus making a statute professedly enacted to prevent fraud, often the instrument of the grossest deception and injustice; and though the English courts first went off on this line of construction, yet the advancing science of the law, and the ever-operating influences of justice to rid it of all technicalities calculated to foster fraud and suppress impartial justice, have induced the English courts, in more modern times, to depart from this line of adjudi-

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cation, and to recognize the power to reform the deed, and then enforce it according to the real contract.

The rule thus early adopted by the English courts lacked the great and essential element of mutuality; for it often happened that the parties could not be put in *statu quo*, and then the vendee was made to suffer the consequences of an innocent mistake or a fraud, and abide by a contract to which his mind never assented.

But to the honor of American jurisprudence it may be said, that its judicial mind, inspired with a devoted love of justice, and less embarrassed with the mere letter, better appreciated the spirit of the statute, hence their earlier advancement to the administration of its true equity and spirit, unencumbered by its mere letter, and that, too, more in consonance with the science of equity jurisprudence.

Mr. Justice Story, in his work on Equity Jurisprudence (*vol.* 1, *sec.* 152), says: "One of the most common classes of cases in which relief is sought in equity, on account of a mistake in fact, is that of written instruments, either executed or executory. Sometimes, by mistake, the written agreement contains less than the parties intended; sometimes it contains more, and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proof entirely satisfactory, *equity will reform the contract, so as to make it conformable to the precise intent of the parties.*"

Again, in *section* 154, he says: "The danger of setting aside the solemn engagements of parties, when reduced to writing, by the introduction of parol evidence, substituting other material terms and stipulations, is sufficiently obvious. But what shall be said where those terms and stipulations are suppressed or omitted by fraud or imposi-

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tion? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity, to accomplish his own base designs? *That would be to allow a rule, introduced to suppress fraud, to be the most effectual promotion and encouragement of it*, and hence courts of equity have not hesitated to entertain jurisdiction to reform *all contracts*, where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding, to some extent, it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control written contracts, *wisely deeming such cases a proper exception to the rule*, and proving its general soundness."

And in the next section he says: "It is upon the same ground that equity interferes in cases of written agreements, *where there has been an innocent omission or insertion of a material stipulation*, contrary to the intention of both parties, and under a mutual mistake. To allow it to prevail in such a case would be to work a surprise or fraud upon both parties, and certainly upon the sufferers; as much injustice would, to the full extent, be done under such circumstances as would be done by a positive fraud or an inevitable accident.

"A court of equity would be of little value if it could suppress only positive fraud, and leave mutual mistakes, innocently made, to work intolerable mischiefs contrary to the intention of parties. *It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule to promote it.* It would be a great defect in the moral jurisdiction of the court, if, under such circumstances, it were incapable of administering relief." And in section 158 he says: "Many of the cases included under this head (*mistake*) have arisen under circumstances which brought

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them within the reach of the statute of frauds, which requires certain contracts to be in writing; but the rule as to rejecting parol evidence to contradict written agreements, is by no means confined to such cases. It stands as a general rule of law, independent of that statute. It is founded upon the ground that the written instrument furnishes better evidence of the deliberate intention of the parties, than any parol proof can supply; *and the exceptions to the rule, originating in accident and mistake, have been equally applied to written instruments within and without the statute of frauds.*" (*Motteux vs. London Assurance Com.*, 1 *Atk.*, 545; *Hinkle vs. Royal Exchange Assurance Co.*, 1 *Ves.*, 317; *Leyman vs. U. S. Ins. Co.*, 2 *John's Chy. Rep.*, 630; *Head vs. Boston Mar. Ins. Co.*, 2 *Cranch*, 419, 444; *Mar. Ins. B., chap.* 8, *sec.* 4; *Andrews vs. Essex Fire and Mar. Ins.*, 3 *Mason's Rep.*, 10; *Delaware Ins. Co. vs. Hagan*, 2 *Wash. Cir. Rep.*, 5.)

Story (*sec.* 159) again says: "The relief granted by courts of equity in cases of this character is not confined to mere executory contracts, by altering and conforming them to the real intent of the parties, but it is extended to *solemn instruments* which are made by parties in pursuance of such executory or preliminary contracts; and, indeed, if the court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable; hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the courts act efficiently by reforming the preliminary contract itself, *and decreeing a due execution of it, as reformed*, if no conveyance or other solemn instrument in pursuance of it has been executed; *and if such conveyance or instrument has been executed, it reforms the latter also, by making it such as the parties originally intended;*" and various authorities are referred to.

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In section 161, in answer to the disinclination of the British courts to receive parol evidence to reform and enforce written instruments, Story says: "But it is extremely difficult to perceive the principle upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the courts to reform written contracts and to decree relief thereon."

In America, Mr. Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject the distinction as unfounded in justice, and has decreed relief to a plaintiff standing in this precise predicament.

Mr. Chancellor Kent has forcibly said: "That it cannot make any difference in reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes, and that is a point settled, the agreement, when corrected, and made to speak the real sense of the parties, *ought to be enforced as well as any other agreement, perfect in the first instance.*" It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. (*Kisselback vs. Livingston*, 4 *John. Chy. R.*, 148.)

In *Wiswall vs. Hall*, 3 *Paige*, 313, where the defendant, being the owner of a certain lot, No. 22, bounded on the Hudson river at the line of tide water, had obtained a grant from the corporation of the right to, and did erect, a wharf in front of his lot. He then sold the premises to complainant, and conveyed them as lot No. 22, as the same was described in and had been occupied and held under a certain deed which was particularly described. Now this lot No. 22 did not embrace the wharf, nor was it conveyed in the deed described; but the defendant held

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it under a grant from the corporation. The defendant, by his answer, insisted *that he did not intend to sell anything more than the lot as it originally was.* The chancellor said he was satisfied, from the evidence, that this allegation was true; but he was also of opinion that the defendant knew that the plaintiff did not so understand the bargain, and that, although he assented to take a conveyance limited to lot No. 22, it was only because he believed that lot and the conveyance embraced the wharf, and he decreed that the defendant should execute a release thereof.

In *De Peyster vs. Hasbrouck* (1 *Kernan, N. York R.*, 587), the appellate court of New York directed the reformation of a mortgage of real estate, and enforced a lien thereon, because valuable erections, which the mortgage supposed were mortgaged, stood on adjoining ground to that actually described in the deed, these being appraised before the mortgage was executed at six thousand five hundred dollars, and the mortgagee loaning twelve thousand dol-dollars, supposing the mortgage included these, with the other premises, and reversed the decision of the supreme court refusing to reform the mortgage, and then to enforce it, because they believed it inconsistent with the statute of frauds. The New York appellate court, referring to the case of *Weswall vs. Hall*, said: "This case is upon principle identical; and it is unnecessary to refer to cases to establish the familiar doctrine that where, *through mistake* or *fraud*, a contract or conveyance fails to express the actual agreement of the parties, *it will be reformed by a court of equity so as to correspond with such actual agreement.*"

And in *Rider vs. Powell* (28 *N. Y. R.*, 312), after due consideration, the appellate court of New York held,

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that where a mortgage of real estate had been executed to secure ten annual payments of three hundred dollars each, but had, through mistake, left out the annual interest on the entire sum of three thousand dollars, that it should be reformed and specifically enforced.

In *Hunter vs. Bilyeu, &c.* (30 *Ill.*, 246), the Supreme Court of Illinois, after thorough argument, decided that the vendee, upon bill filed against the heirs of the vendor, could have a bond reformed so as to include lands left out by mistake in the description of several tracts, and was entitled to a specific enforcement of the reformed bond, and, therefore, directed a conveyance of the tracts left out.

In *Huffman vs. Fry et al.* (5 *Jones' Equity R.*, 415), the Supreme Court of North Carolina held, at the instance of the mortgagee, that the mortgage could be reformed and specifically enforced against the general creditors, it clearly appearing that the mortgage, through mistake, was made to secure one dollar instead of one hundred dollars.

The two New York, the Illinois, and the North Carolina cases, were instances of reformation sought by the vendees against the vendors, and were clearly within the statute of frauds.

In *Brown vs. Lampton* (35 *Vt.*, 258), the vendor sought the reformation of the deed of conveyance, because it conveyed the tract of land sold, together with all its appurtenances, without reservation; whereas, by the contract the vendor was to retain the right to use the water from a spring, and to convey it through acqueducts to several houses owned by him, situated near by; but which reservation, by mistake, was left out. The Supreme Court of Vermont directed the vendee to recon-

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vey this right to use the spring, though he denied the mistake.

This court, in *Athy vs. McHenry* (6 *B. Mon.*, 59), directed a perpetual injunction as to Athey and his subsequent vendees against erecting any building on ten feet front of a lot in the city of Louisville, so as to exclude air and light from the house of his vendor, McHenry, it being shown that when the latter sold him the strip of ten feet it was agreed that the front was to remain an open space, and not to be covered by any building, so as to exclude air and light from the vendor's house; but this was left out of the deed of conveyance by mistake. Nor will it do to say, in response to this decision, that the statute of frauds was not alluded to, for as the statute had no application to the case, there was no need of reference to it.

And in *Thomas vs. McCormack* (9 *Dana*, 108), this court, expounding the rules governing writings and deeds, said that parol evidence could be heard as against them, either for fraud or mistake, when asserted in the pleadings, and could be relieved against.

In *Bates et al. vs. James' heirs* (*MSS. Opin., last term*), this court reversed the chancellor's judgment in rescinding a contract of exchange of Jefferson county, Kentucky, for Mississippi lands, because the deed, by mistake, described lands in Mississippi six miles from where the lands sold were situated; yet the vendor, offering to correct the mistake, this court directed it to be done, and the vendee held thereto. And, at the present sitting, this court, in *Mourning vs. Stratton*, has held, that when a vendor had assigned the vendee's note before he conveyed by deed, of which the vendee had notice, that a subsequent conveyance by the vendor, without specifying the note held by his assignee, was a fraud upon the holder of the note, and did not waive his lien.

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And in *Mattingly and wife vs. Speak et al.* (4 *Bush*), this court held, that where a father, intending to convey land to his married daughter and the heirs of her body, through mistake conveyed it to the son-in-law and his heirs, the deed could be reformed, even after the death of both the grantor and grantee, upon clear and satisfactory evidence of the mistake.

The provision of the statute of frauds is, that no suit shall be brought to charge any person, "*upon any contract for the sale of real estate*, or any lease thereof for a longer term than one year, unless the promise, contract, agreement, &c., or some memorandum or note thereof, be in writing, *and signed* at the close thereof *by the party to be charged*."

It will at once be perceived that this suit is not to charge any person upon any contract for the sale of land, but it is a suit by the vendor to correct a mistake in his own deed, by which he conveyed a right—rather by which he waived a right—in himself contrary to the contract, and clearly does not fall within either the letter or spirit of the statute of frauds, but belongs peculiarly to that class of cases wherein courts of equity reform and specifically enforce the reformed contract, for fraud, omission, or mistake.

It has never been held that when the vendor had delivered to the vendee his memorandum in writing on the sale of land, that he must have a memorandum in writing to enable him to recover the purchase price, because, even the statute of frauds does not require this; but no one can be compelled to convey lands, unless the sale be attested by a writing; when, however, a contract of sale is so attested, though, through fraud or mistake, the real sale, as made, is not set forth, yet the current of American authorities recognize the power and duty of the

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chancellor to reform the writing, and then enforce it, when certainly coming within the provisions of the statute; but when it does not come within the purview of the statute, *as this case does not*, there is no contrariety of adjudicated authority in England or America; for it then falls within the general jurisdiction of the chancellor to correct for fraud, omission, or mistake, unqualified by the statute, also justified by the same exceptions to that rule of evidence which recognizes written as of higher and more reliable testimony than parol, equally recognized by the courts of both countries.

After the contract of sale, and until the deed was executed and delivered, the vendor, by the laws of this State, had a lien for the unpaid purchase price. This lien, it was contracted, should be continued, and not waived by the deed, and the draftsman was instructed to so draw it; and he and the parties thought it was so drawn. No third innocent party, as purchaser for a valuable consideration, is involved. To say that the vendor lost his lien beyond the power of the chancellor to allow and enforce it, is to make the law an agent of fraud and the chancellor an imbecile in the administration of justice, likewise to destroy every principle upon which contracts are upheld and regarded, as neither the mind of the one nor the other party assented to such a contract; beside, there was no consideration contracted or paid to uphold it; but simply, by mistake, the deed sets out a contract never made; and when the vendor seeks to enforce the real contract, the vendee meets him with the deed, and a denial of the right of the court to investigate it, or of the vendor to show mistake, omission, or fraud, and that, too, in a case not within the statute of frauds.

Before our revision almost any vague expression in the vendor's deed, showing that all the purchase money had

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not been paid, was held sufficient to put subsequent vendees upon their guard, such as used in this deed, of "*paid and to be paid*;" hence, after vendees, who had paid all the purchase price to their vendors, were often surprised by the assertion of a lien by some remote vendor, and thus injustice was sometimes done to remote vendees. To remedy this evil, our Revised Statutes require the amount of the vendor's unpaid purchase price to be specified in his deed of conveyance, else his lien is thereby waived; but, as between the original parties or volunteers under them, this was never intended either to work a fraud, to alter the rules of evidence, nor to take from the chancellor one of his most valuable jurisdictions.

It is said by Story, and is a most just and reasonable rule, that, in the reformation of deeds, the just rights and equities of third and innocent parties, purchasers for a valuable consideration, without notice, are not to be disturbed; for, as between vendor and innocent remote vendees, the loss should fall on the one who, through his own negligence, may, to some extent, be regarded as the author of the misfortune. The evidence of the draftsman alone, since the adoption of our Civil Code, is sufficient to establish the allegation of mistake, though denied in the answer.

Section 142, Civil Code, requiring that the pleadings, with certain exceptions, should be verified, provides "that such verification shall not make other or greater proof necessary on the side of the adverse party."

And in *Albro vs. Lawson* (17 *B. Mon.*, 644), this court held, that the rule which required two witnesses, or one witness, with strong corroborating circumstances, to overcome a denial in an answer in chancery, has been changed by said section of the Code, which was subsequently

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affirmed by this court in *Enders vs. Williams* (1 *Met.*, 354–5). So it may now be regarded that the oath of the plaintiff and the defendant making an issue, are equivalents, and the issue to be adjudicated upon the evidence. But one witness testified in this case—the draftsman. There are no contrariety of facts, but the language of the deed, the insolvency of the purchaser, Henry Tuggle, both signally confirm the positive and emphatic statements of the only witness that a lien was contracted for, and was to be retained, and was to be set out in the deed, and that all the parties thought it was so set out.

Wherefore, the judgment is reversed, with directions to reform the deed and allow the lien, selling first the undivided interest of Jno. Tuggle for that purpose.

Judge Robertson dissenting.

JUDGE ROBERTSON DELIVERED THE FOLLOWING DISSENTING OPINION:

Henry Tuggle, having bought from the appellant, Elijah Worley, a tract of land, for the unpaid price of which, he gave his promissory notes, the legal title was conveyed to his son and to his step-son; and having afterwards died intestate and insolvent, this suit *in rem* was brought against his surviving widow and heirs for enforcing an alleged lien not reserved by the deed, which, as charged, omitted it through mistake. Only *one witness* testified to the allegation denied by the answer. The circuit court dismissed the petition. Oral evidence of such a mistake in the written memorial of the contract required to be in writing, cannot availably supply the omission or change the legal effect of the written memorial, so as to subject the vendee or the land to any liability not imposed by the writing. Were the law

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otherwise, the statute requiring written evidence might be evaded and often frustrated by oral testimony of what the statute requires to be shown by written evidence only, *before a suit can be maintained on it.*

The deed neither reserves an express lien nor recites the amount of the unpaid consideration from which, according to a statute of this State, an implied lien would have resulted. The appellant now insists that the unwritten contract for a lien should be enforced against the plea of the statute of frauds and perjuries, providing, in effect, that *no suit shall be maintained for enforcing a contract* for the sale of land, or for an encumbrance on it subjecting it to sale, unless there be a written memorial of the contract as sought to be enforced. But reason, policy, and authority all oppose this assumption.

The philosophy of evidence interdicts, as a general rule, oral testimony inconsistent with written evidence, intrinsically the highest, and presumptively intended by the parties to be the only, evidence of this contract. Policy and justice, however, have, to a qualified extent, relaxed this prudent rule in cases of well-established fraud or mistake in reducing the oral contract to writing. And even in contracts within the scope of the statute, the reason of the exception allows a *defendant* to prove that a written contract sought to be enforced against him is, through mistake, essentially different from that intended by the contracting parties. And this is not inconsistent with the statute which, intending only to save *land* from the danger of false and suborned testimony, does not provide that a written memorial of sale may not be resisted for mistake when sought to be specifically enforced. Except for the purpose of enforcement, a written contract for land, like every other written contract, may be modified by clear proof of essential mistake.

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For all defensive purposes, the statute requiring written evidence does not apply, but leaves evidence to the common law tests of competency and effect; and, consequently, no doctrine is either better settled or is more consistent than that which allows a *defendant* to resist the equity of the extraordinary relief of a specific execution of a written contract for land, by oral proof of the rebutting equity, resulting from a mistake in making the written memorial describe a contract which was, in fact, never made or contemplated. This violates no statute of frauds, and is, therefore, permissible on the general principle which allows oral to contradict written evidence. But the statute excludes that principle whenever a party to a contract for land seeks to enforce an oral agreement against or in lieu of that which, as required, is written. In such a case, the other party may well say, "however clearly you may seem to prove by oral testimony a contract different from the written memorial, and however conclusively you may thus show that the contract, as written, should not be enforced, yet, nevertheless, there is no written evidence of the contract, which I deny, and which you are seeking to enforce in defiance of the inexorable and conservative statute, which peremptorily forbids the enforcement of *any* such *oral* contract."

Were the only question in such a case the admissibility of oral to contradict written testimony, then certainly both plaintiff and defendant would stand on the same platform, and be entitled to the same privilege. But that is not the decisive question when a party seeks a specific execution of an oral sale of land, or of a lien upon land. The statute then comes in, and, *without qualification or exception*, inflexiby requires written evidence of the *alleged* contract, and, in its application to such a case, the statute

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is fortified by the fact that the parties had prudently reduced to writing a contract essentially different from that sought to be enforced on oral evidence, in opposition to the evidence which they had chosen as the surest test of their rights. But, waiving this consideration, it is evident that superseding the written evidence, leaves the contract without any other than oral evidence, and the *status* of the parties is precisely what it would have been had there never been any written memorial. This would be the inevitable and utmost effect of proving mistake; and then, if the transmuted contract be enforced, will it not be enforced as a contract merely oral, in the teeth of the statute, and may not the legislative purpose be perverted and altogether frustrated?

A single example may sufficiently illustrate the right doctrine and the true contradistinctive principle. A, owning two tracts of land of different quality and value, sells to B the tract worth one hundred per cent. the most; but his bond for a title, through either fraud or mistake, clearly describes the least valuable tract, and cannot be so construed as to embrace the tract actually sold. B refusing to pay for the inferior tract, A sues him for a specific execution of the contract, as falsely written. In resisting A's asserted equity B may prove the true contract, and defeat the suit; but can he, by retorting a prayer for a specific execution of the oral contract for the better tract, coerce a conveyance of it? The statute is dead unless it says *no;* and then for what purpose was it made? A *bonus* of a portion of the land might suborn witnesses to testify falsely to the alleged mistake, and thus take from the owner land he never sold. To save from any such perjury and spoliation of real estate, was the only object of the statute; and to deny its availibilty in such a case would virtually nullify it. And here we

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may see why a plaintiff cannot, by suit, take from the defendant his land without written testimony, and why, at the same time, he cannot, even on written evidence, impose on him land he never actually sold him; and why, therefore, oral proof of mistake may be available for resisting a specific execution of a written contract for land, but can never entitle a plaintiff to a specific execution of any unwritten contract. And it is rather strange that Chancellor Kent once said that he could not see why, if a defendant might resist a specific execution of a written contract for land by oral proof of mistake, a plaintiff might not have a reciprocal right to enforce an oral contract by proof of mistake in a written memorial; and it may be still stranger that Mr. Story seemed to indorse that unauthoritative saying, never authoritatively ratified or recognized. The true and sure clue to the labyrinth which perplexed those eminent jurists is quite palpable: it is, that the statute of frauds applies to one and does not apply to the other class of cases. This clue shows why, also, a deed purporting an absolute sale may, by oral testimony of mistake, be shown to have been intended only as a mortgage, and why a deed, purporting to be only a mortgage, can never be transformed, by oral proof, into an absolute sale. In the former case the statute of frauds does not prevent resistance to a written contract, but in the latter case it prevents a recovery beyond or against a written contract; and this is perfectly consistent, has never been judicially disregarded even by Story or Kent, and is impregnably established by an overwhelming current of authority, British and American, both judicial and elementary. Any other doctrine is inconsistent, and indefensible on principle.

On this subject, Story, in his Equity Jurisprudence (*section* 161), says: "It is admitted that a defendant,

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against whom a specific performance of a written agreement is sought, may insist, by way of answer, upon mistake as a bar to such a bill; because, he may insist on any matter which shows it to be inequitable to grant such relief. A court of equity is not, like a court of law, bound to enforce a written contract; but it may exercise its discretion when a specific performance is sought, and may leave the party to his remedy at law. It will not, therefore, interfere to sustain a bill for a specific performance, and when it would be against conscience and justice to do so. On the other hand, it seems equally clear that a party may, as plaintiff, have a relief against a written contract by having the same set aside; and canceled or modified, whenever it is founded in a mistake of material facts; and it would be unconscientious and unjust for the other party to enforce it at law or in equity. But the case intended to be put differs from each of these. It is where the party plaintiff seeks, not to set aside the agreement, but to enforce it when it is reformed and varied by the parol evidence. A very strong inclination of opinion has been repeatedly expressed by the English courts not to decree a specific performance in this latter class of cases—that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it as varied and established by that evidence. On various occasions, such relief has, under such circumstances, been denied." *And his numerous citations of unquestioned authorities sustain this text.*

The same author, in his chapter on Specific Performance (*sections* 770 *and* 770*a*), says: "The statute has said that no person shall be charged with the execution of an agreement who has not personally or by his agent signed a written agreement. But the statute does not say that, if a written agreement is signed, the same exceptions

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shall not hold to it as did before the statute. Now, before the statute, if a bill had been brought for a specific performance, and it had appeared that the agreement had been prepared contrary to the intentions of the defendant, he might have resisted the performance of it. The statute has made no alteration in this respect in the situation of the defendant. It does not say that a written agreement shall bind, *but only that an unwritten agreement shall not bind.*

"But, in the case of a plaintiff seeking the specific performance of a contract, if it is reduced to writing, courts of equity will not, ordinarily, entertain a bill to decree a specific performance thereof, with variations or additions or new terms, to be made and introduced into it by parol evidence; for, in such a case, the attempt is to enforce a contract partly in writing and partly by parol; and courts of equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, *independently of the objection which arises in many cases under the statute of frauds.*"

And, in support of this text, many current decisions by the British courts are cited; and among these, is the judgment of Lord Cottenham in the *London and Birmingham Railway Company vs. Winter* (1 *Craig & Phillips*, 57), in which the chancellor said, as to oral variations from a written contract, "that, in such a case, the contract is not in writing, but in the terms verbally stated to have been the agreement between the parties, and, *therefore*, refuses specifically to perform such a contract."

And among the cases cited by the same author, in his chapter on Mistake, is that of *Attorney General vs. Sitwell* (*Young & Coll.*, 559), in which Baron Alderson said: "I cannot help feeling, that, in the case of an executory agreement, first to reform, and then to decree an execu-

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tion of it, would be virtually to repeal the statute of frauds. It seems to me that the court ought not, *in any case*, where the mistake is denied or not admitted by the answer, to admit parol evidence, and *upon that evidence* reform an executory agreement."

And all other British decisions within the range of our knowledge harmonize with the principle recognized in the foregoing quotations; and we have seen no authoritative American decision essentially different.

Sugdon, in his Treatise on Vendors, collating the British authorities, announces as their unanimous conclusion, that mistake in a written contract for the sale of land, proved by oral testimony establishing a different contract, "*can only be used as a defense to a bill demanding a specific performance, and is inadmissible as a ground to compel a specific performance;*" and the only exception he makes is a case of part performance of an unwritten agreement, which, according to the inconsistent doctrine then recognized in England, took the case out of the statute; and that exception has been invariably repudiated by this court as a virtual repeal of the statute; because, though part performance may be evidence of some contract, yet it is no proof of the terms or extent of the contract, and, by subornation, men might "*be even proved out of their estates*" in defiance of the letter and policy of the statute. *Consequently, this court has always been less inclined than those of England to relax the statute by the application of oral testimony.* And this court, therefore, has never adjudged that an oral agreement for selling or encumbering land could, under any circumstances, be specifically enforced when the statute has not been waived; but has often decided otherwise.

In *Smith vs. Smith* (4 *Bibb*, 81), the opinion delivered by Chief Justice Boyle clearly implies, that, while oral

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evidence may resist, it cannot enforce a specific performance of a contract embraced by the statute of frauds respecting sales of land.

In *Harrison vs. Talbot* (2 *Dana*, 268) this court adjudged the dismission of Harrison's cross-bill for reforming, by oral proof, a written memorial of a sale of land to him, and then for a specific enforcement of the agreement as so varied; and the only reason for that judgment was, in the language of the court, "because he (Harrison) cannot, *in the attitude of complainant*, compel a *specific execution* of the contract *varied or modified by parol evidence, nor otherwise, than according to the import and effect of the written memorial of the sale.*"

Hanly vs. Shrieve (1 *Dana*, 1) recognizes the same doctrine.

And in *Churchill vs. Rogers* (3 *Mon.*, 81) the same principle was directly and specifically recognized and applied to a bill by Churchill, charging that a conveyance of land sold to him by Rogers did not, through mistake, embrace all the land actually sold, and praying for an extension of the boundary so as to include the pretermitted land, or for a conveyance of that land. The opinion of this court, delivered by Chief Justice Boyle, after stating that there was no complaint that the deed as made did not accurately describe, as to identity and quantity, *the land conveyed by it*, concluded as follows: "There is indeed evidence in the cause conducing to prove a verbal agreement on the part of Rogers, that the lines might be extended so as to include the land which is now contended by Churchill ought to have been conveyed; but to sustain the bill and grant *Churchill relief on such agreement, would be directly contrary to the letter, as well as the spirit, of the statute against frauds and perjuries.*"

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The same doctrine has been virtually recognized, *arguendo* and otherwise, by this court in many cases, and has never, so far as we know or believe, been overruled or questioned by any Kentucky case. The case of *Athy vs. McHenry*, cited *contra*, does not allude to the statute, nor intimate that an oral contract for the sale of land or encumbrance subjecting land to sale, or a written contract altered by oral testimony of sale, or such encumbrance, can be specifically enforced against the vendor *when resisted on the ground of the statute*. That case only decided that a *purchaser* should be enjoined from obstructing ventilation and light to the vendor's house, the enjoyment of which, as an easement, was a part of the consideration of his sale of the adjoining ground, and was reserved by the agreement; but, through inadvertence, was not expressed in the conveyance. That judgment may have been right. The case was not within the statute. The vendee was not seeking to enforce an oral contract for the sale of land against the *vendor*, but the vendor sought to enjoin his vendee from a nuisance in violation of an oral contract not to commit it.

According to the statute as interpreted, oral evidence was admissible, and, if satisfactory, was sufficient in that case. It was not taking from the vendor any land or service sold by him without a written memorial. It was only enforcing against the vendee a part of the consideration of his purchase; and so far as the statute is concerned, the only question was, whether, in such a case, oral evidence was admissible to supply an omission in the conveyance to the vendee concerning light and air that might not have required a written contract, and which, according to the common law, untouched by the statute, was admissible in such a case on proof of mistake in the written memorial of the contract of sale by

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the vendor; *and, therefore, the court did not consider or allude to the statute of frauds.*

That case of *Athy vs. McHenry*, therefore, may be perfectly consistent with the other Kentucky cases, and with the established exposition of the statute of frauds, and certainly does not overrule, or even question, their authority, which seems not only rational and coincident with all the British decisions, but conclusive now on this court after its undeviating recognition for more than sixty years. Nor do we find that the Supreme Court of any American State has established a conflicting doctrine; and if it had done so, it would not be either authoritative, or even availably argumentative, in this *forum*, against the limpid volume of its own prescriptive authority, backed by that of England, and certainly by most of the States of our Union. The converse is surely not entitled to the dignified and imposing appellation of "*the American doctrine;*" certainly not as much so as the doctrine of part performance is the American doctrine.

There *are* American, and *English cases too*, in which the alleged mistake or oral agreement not being denied and the statute waived, a specific performance has been, and *properly*, decreed; and there may be a few sporadic cases in which a divided bench has, for *fraud*, enforced a contract for the sale or encumbrance of land, as reformed by oral proof indisputable. Such is the case of *Depeyster vs. Hasbrouck* (*1st Kernan's New York Reports*). But this, however inconsistent or questionable, is not in the same category of a reformation and enforcement on the ground of mere mistake; and neither in New England nor New York, nor any other American State, has the judiciary authoritatively established the doctrine that, *against the plea of the statute*, an oral contract or a written

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contract, essentially varied by oral testimony, on the ground of mistake, can ever be specifically enforced by suit, except on the indefensible ground of part performance. Wherever we find *dicta* to that effect, we find judicial decisions to the contrary. This is true of the *dictum* in the case of *Hunter's adm'r vs. Bilyeu, &c.*, in 30*th Illinois Reports*, in which, nevertheless, the court adjudged against the prayer for specific performance; and in the same State, the same tribunal, in the case of *Updicke vs. Armstrong*, as well as in other cases, adjudged that "the statute applies." All the New England States have likewise so adjudged, and New York has not settled any other doctrine.

The case of *Rider vs. Powell* (1 *Tiffany's New York Reports*) has no essential application to the question we are considering. In that case, adjudged by an almost equally divided court, it was decided that Rider, the vendor of land, might, on oral proof of mistake, reform the consideration recited in a mortgage made to secure payment; and it is well settled here and elsewhere that the recital in a deed of the consideration is not conclusive, but may be disproved or qualified by oral testimony. The Kentucky statute of frauds does not require the consideration to be stated in the written memorial of a contract for the sale of land; and we do not judicially know that the New York statute differs materially from ours. However this may be, the question of proof of the true consideration depended, in that case, on the common law, unaffected by the statute; and, therefore, the opinion in that case is no authority on the statute of frauds and perjuries. Nor does the case of *Gillispie vs. Moore* (2 *Johns. Ch'y. Reps.*, 585), or that of *Keiselbrock vs. Livingston* (4 *Ib.*, 144), adjudge more than the admitted doctrine, that in cases not within the statute of frauds and perju-

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ries, oral evidence may modify a written agreement, and as well for the plaintiff seeking correction and enforcement as for the defendant resisting specific performance. In neither of these cases did Chancellor Kent decide that an oral contract or a written contract for the sale of land, essentially modified by oral testimony, could, if denied, be specifically enforced in defiance of the statute peremptorily declaring that *no suit shall be maintained for enforcing a contract for the sale of land unless it be in writing*. He said truly that the statute did not apply to the case of *Keiselbrock vs. Livingston*; and it is equally evident, not only that it did not apply to the case of *Gillispie vs. Moore*, but that the chancellor's only object was to settle the then controverted competency of oral evidence to contradict or correct written evidence—a doctrine now universally recognized by enlightened jurists; *and all the cases cited in his opinion show* nothing more than that oral evidence is admissible, in cases of well-established mistake, to change a written contract; and no one of them intimates an application of that established doctrine of the modern common law to cases in which a plaintiff, on proof of mistake, and of an oral contract essentially different from the written memorial, seeks a specific performance of the oral contract; and to that class of cases alone the statute wisely applies, by its express and inevitable provision against any suit to enforce *in invitum* an oral agreement for the sale of land, or an encumbrance on land which may subject it to sale, and is, therefore, potentially the same thing.

A failure to discriminate clearly between cases embraced by the statute, and the more comprehensive class of cases unaffected by it, has been the cause of many indiscriminating adjudications and loose *dicta* on the competency of oral against written evidence, and the reci-

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procity of its availability to both parties to contracts. But while what has been adjudged and said is generally true, all of it together does not show, or tend to show, except in cases of part performance, that an oral contract for the sale of land can be specifically enforced against a resisting party relying on the statute. And although neither Chancellor Kent nor Justice Story at one time perceived why oral testimony might not be equally competent against written evidence in all contracts and for all parties, yet neither of them *ever so adjudged*. When they spoke on that subject the British doctrine of part performance, now much regretted in England, had been recognized in most of the American States, and the precise extent of the operation of the statute of frauds and perjuries had not been authoritatively defined. In that chaotic state of the law it is not at all strange that even those two distinguished jurists were bewildered, like many others, in the twilight. But now the true range of the statute is better defined and understood, and more consistently applied exclusively to suits for the specific performance of oral contracts for the sale of land, according to its clear and express provisions to that effect, *and that only*. And, excepting cases of part performance, never tolerated in Kentucky, I know of no case, British or American, in which it has been considerately and authoritatively adjudged that an oral contract for a sale of land, or, what is the same thing, an essential alteration of a written memorial of such contract, attempted by oral testimony, can be specifically enforced consistently with the statute when properly relied on. It has never been so adjudged by this court, whose prescriptive authority has been uniformly the other way. And if that authority, and that also of England and of most of the American States, be now overruled by a majority of this court,

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against the opinion of the circuit court and this protest, the next and more consistent step in the revolution must be to overrule the Kentucky doctrine in respect to part performance, and thus, by one three-handed blow, strike the statute dead, and leave real estate a prey to hired perjury. Never before was a solemn writing reformed anywhere on the solitary "understanding" of one unimpeached witness.

Preferring to stand *super antiquas vias*, and satisfied also that the old Kentucky way is the right way, and that now blazing a new way, in an unexplored wilderness, must be delusive and unsafe, I cannot concur in reversing the judgment of the circuit court, sustained, as I believe it is, by principle and policy, by British and American authority, and, above all, by the undeviating, and, to us, paramount authority of our own venerable and conservative Commonwealth.

I therefore respectfully, but confidently, submit the foregoing considerations as sufficient grounds to excuse my dissent from the reasoning and judgment of a majority in this pregnant case.

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CASE 40—PETITION EQUITY—OCTOBER 17.

McCasland vs. Martin, &c.

APPEAL FROM OLDHAM CIRCUIT COURT.

"I give to my wife * * * as much of the remainder of my estate, after my debts *is* paid, * * * as will be sufficient for her support during life; and the balance of my estate, both real and personal and mixed, I will to my daughter * * * and her children. * * * I authorize and empower my executrix and executor to sell and convey whatever property, either real or mixed, they may think best, to pay my debts, except my interest in my brother John's estate; * * that I wish to stand undisposed of for the benefit of my daughter * * * and her children." * * * *Held*—The residue of the estate having been disposed of to pay debts, the widow was entitled to her support during life out of the rental of the interest of the testator in his brother John's estate, which was not sold to pay debts.

JOHN RODMAN, For Appellant,

CITED—

2 *Marshall*, 217; *Baird vs. Rowan.*

Williams on Executors, 928, 931.

3 *J. J. Mar.*, 321; *Berry vs. Readington.*

2 *B. Mon.*, 462; *Pattie vs. Hall.*

HARLAN & HARLAN For Appellees.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

James McCasland, who died testate in the county of Henry in 1849, after providing in the second clause of his will for the payment of his debts, with the interest thereon at the rates he contracted to pay, in the third and fourth clauses made the following disposition of the residue of his estate:

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"*Third.* I give to wife, Mary McCasland, as much of the remainder of my estate, after my debts '*is*' paid, and such articles as she may choose, as will be sufficient for her support during her life; and the balance of my estate, both real and personal and mixed, I will to my daughter, Nancy Martin, and her children, so that none of it, nor the proceeds thereof, shall be liable or in anywise subject to the payment of any of my son-in-law, John Martin's debts or contracts, but be placed in the hands of————, trustee, for the benefit of said Nancy and her children.

"*Fourth.* I appoint my wife, Mary McCasland, executrix, and empower her to choose some suitable man to act with her; and I authorize and empower my executrix and executor to sell and convey whatever property, either real or mixed, they may think best to pay my debts, except my interest in my brother John P. McCasland's estate, deceased; that I wish to stand undisposed of for the benefit of my daughter, Nancy Martin, and her children; and, at the death of my wife, whatever property she may choose to keep, is to return to my grandchildren, as before described. But in case of the death of Nancy Martin and her children, so that she or they leave no issue whatever, the remains of my estate *is* to return to my legal heirs, as though I had died without will or issue."

The will was probated, and the widow having selected her brother, Isaac Whittington, to qualify with her, they undertook the execution of the will.

In August, 1858, this suit in equity was brought in the Henry circuit court, afterwards removed by change of venue to the Oldham circuit court, by the widow against Mrs. Martin, her husband, children, and trustee, alleging that testator was greatly indebted at his death; that it required the whole of his property to pay them, all of which was sold and the proceeds applied to that purpose,

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except the sum of two hundred and fifty dollars, which she got, as is shown by the settlements of the accounts of the executors, which have been approved and confirmed by the Henry county court, copies of which are exhibited with the petition; that she is old, and so afflicted that she is unable to walk, and helpless, and that she cannot make a support, and has been supported since the death of her husband by her relatives and friends, without charge; that neither she nor her co-executor took said lot in possession, but that it has been used for the use and benefit of the daughter of testator and her children; that it is very valuable; they have received large sums *per annum* for rents; and she prays that the sum of three hundred dollars per annum out of the annual rents be adjudged to her as an annuity during her life, that being as little as she can be supported for.

On final hearing her petition was dismissed, and she has appealed to this court.

That the estate of testator, except the lot in Louisville, and about two hundred and twenty-five dollars or two hundred and fifty dollars, which appellant got, was exhausted in the payment of his debts, is conclusively shown by the county court settlements of the executor, which are neither surcharged nor seriously contested; and the advanced age, afflicted condition, and extreme destitution of appellant, are all fully established by the proof. And the only question to be solved is, whether, under the will of her husband, she is entitled to a support out of the lot in Louisville, which is the estate he got by the death of his brother, John McCasland, and referred to in the will, as appears from the agreement of the parties, and is all that is left of the estate of testator after the payment of his debts?

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It appears from the will that it was the primary object, as it was the imperative duty of the testator, to make ample provision for the support of his widow during her life; hence he gave her as much of the residue of his estate, after the payment of his debts, with such articles as she might choose, as should be sufficient for that purpose, and only gave to his daughter and her children what was left. If, then, it took all he had to maintain his wife, he devoted it to that object, and postponed appellees in the enjoyment of any part thereof until his wife should no longer need it. This is the manifest, and it may be said declared, intention of the testator in the third clause of his will. Is there anything inconsistent therewith in the fourth and last clause? In that clause he authorizes his wife to select some suitable *man* to act as executor with her, and confers on them the power to sell and convey whatever property they may think best to pay his debts, except his interest in the estate of his brother, John P. McCasland, deceased; that he wished to remain undisposed of, for the benefit of his daughter and her children; and at the death of his wife, whatever remained of the property she chose to retain, was to return to his grandchildren. He does not, in this clause, in express terms, vest a present interest in his daughter and her children in said lot; he only withheld the power from his wife and co-executor to sell it, and gave his reason therefor; and while it may be admitted, that, if this clause stood alone, and to be construed without reference to the preceding parts and whole context of the will, it would be regarded as a devise by implication to said beneficiaries of the lot, but when considered in connection with other parts of the will, the interpretation contended for by appellees cannot be given to it.

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Why, it may be asked, if that was the intention of the testator, did he not, in the same sentence in which the power of sale was withheld, devise the lot directly to his daughter and her children? He could have done it as easy, and with as few words, as he used in giving his reason for withholding that power. The answer is found in the fact that he had previously charged the whole of his estate with the support of his wife; and looking to the increasing value of the lot, situated as it was in the rapidly growing city of Louisville, and for other reasons which naturally suggested themselves to him, as may be imagined, he prohibited the sale of it; but in doing so, did not exempt it, or the annual profits arising from the rent, from the burden of supporting his wife, which he had previously imposed on the whole of the residue of his estate after the payment of his debts; and this view is perfectly consistent with the language of the fourth clause, saying he wished it (the lot), because he got that from the estate of his brother John, "*to stand undisposed of*," to remain as a part of his estate—for what? The benefit of his daughter and her children. Then follows the words, connected with the copulate word, "*and at the death of my wife, whatever property*" she may have kept, is to return to my grandchildren. These words, "whatever property," clearly mean any, and if need be, all of the testator's property left, after the payment of his debts, as he did not *expressly* exclude any from the burden of supporting his wife. This construction gives to Mrs. Martin and her children whatever may be left after the widow gets a support, and harmonizes the whole will and gives effect to every part of it.

The lot has been improved, and rendered much more valuable and productive than it was when testator died; but it does not appear that it is the result of any peculiar

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sagacity of those in possession, or extraordinary skill in its management, but may be attributed rather to the rapid growth of the city and consequent demand for lots and building sites.

This court cannot resist the conclusion that appellant has a clear right, under the will of her late husband, having surrendered all the residue of the estate to pay his debts, to a reasonable sum for her support, out of the annual rents of said lot, which, as the proof shows, were six hundred and eighty-nine dollars per annum from the 1st of April, 1853, to 1st of same month, 1866; and for the year ending 1st of January, 1867, the rent was at least two thousand dollars; and for the year 1867, about four thousand dollars, after deducting taxes, &c. This sum was appellee's part of the rent; and the property unimproved, according to the evidence, is worth over thirty thousand dollars. These large rents are produced without any outlay on the part of appellees; but from improvements put on it by tenants, who have made them with their own means for the purpose of participating in the rents, and appellant and her co-executor could and probably would have made as advantageous a disposition of the lot, if they had retained it, as appellees have made.

Wherefore, the judgment of the court below is reversed, and the cause remanded, with directions to render judgment in favor of appellant against appellees for two hundred and fifty dollars *per annum*, from the 16th of August, 1858, this being the day when the original petition was filed, to the 16th of April, 1863, and interest on the aggregate sum from that period, till paid; and for three hundred dollars per annum from the 16th of April, 1863, that being the time when the amended petition was filed, to the 16th of April, 1868, with interest on the aggregate sum from the last named date till paid; and he will

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adjudge to her an annuity of three hundred dollars per annum from the last named date, to be paid semi-annually; and the court will retain power over the cause to enforce its judgments, and for such future adjudication as may hereafter be proper.

CASE 41—PETITION EQUITY—OCTOBER 9.

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e111 60

Hubbard vs. City of Hickman.

APPEAL FROM FULTON CIRCUIT COURT.

1. The law does not imply a promise upon the part of the city of Hickman to make restitution for taxes levied and paid for ten years by mistake of the law under which the levy was made. But, as the appellant helped to impose the tax, and otherwise ratified it, he was under an honorary obligation to his fellow-citizens who, therefore, paid their portions of it, to contribute his share of the self-imposed burthen.
2. A payment of a debt barred by the statute of limitations, can never be recovered back on a plea of mistake of law or fact. There was an honorary obligation to pay, and the law would rather presume that, therefore, payment would have been made, had there been no mistake as to the bar.

RANDLE & TYLER, For Appellant,

CITED—

Act of March 10, 1854, *to reduce into one the various acts concerning Town of Hickman, and by-laws of Hickman.*

14 *B. Mon.*, 648; *Johnson vs. City of Lexington.*

2 *Met.*, 226; *City of Covington vs. Elliston.*

Revised Statutes, section 12, *Revenue and Taxation*, 2 *Stanton*, 252.

2 *Met.*, 228; *City of Covington vs. Powell, &c.*

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JOHN RODMAN, For Appellee.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The appellant brought this action against the appellee for reclamation of one thousand five hundred dollars which, through alleged mistake of law, he had, for ten consecutive years, paid, at the rate of one hundred and fifty dollars a year, under an assessment by the municipality of his *choses in action* for local taxation.

The answer insists that the tax was legal—avers that the appellant, all the time, was a municipal officer, approved and aided in the enforcement of the like taxation on others, and once, as councilman, voted to impose it; and, alleging that he failed to list at least eighty thousand dollars of choses in action, the appellee therefore asserted a counter-claim for the surplus improperly pretermitted. On a demurrer to the answer, the circuit court, reverting to the petition, adjudged it insufficient, and dismissed it.

The fourth and fifth sections of the act of 1854 (*Session Acts*, *p.* 561), like the charter of the city of Lexington, authorized the city to assess "all the real and *personal* estate *of the city;*" and, in the case of *Johnson vs. The City of Lexington* (14 *B. Mon.*, 648), this court exonerated Johnson from the payment of a municipal tax imposed on his *choses in action.*

That case and this differ in two respects. 1st. Johnson resisted payment. The appellant, after ten years, seeks to recover back what he voluntarily paid. 2d. The charter of Lexington did not contain the following provision of the act of 1854: "In making assessment for the railroad tax, all property taxed shall be given in under the same rules and regulations required in giving in taxable property for State revenue."

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Whether this supplement was intended to adopt the equalization law of the State, or meant only to fix the mode of listing "real and *personal* estate," is a rather vexatious question, which we will not decide in this case, as we would be compelled to do had not the appellant paid the tax as and when he did. Having so paid it, has he a conscientious claim to restitution, so far as not barred by limitation? And is there any implied promise to pay it back? We think not.

It is difficult to prove a mistake of law, or that it was the only reason for payment; and it is neither alleged nor sufficiently proved that a mistake of law was the appellant's only motive for so long paying the tax. We may presume other and higher motives, whatever he may have thought of his *legal* obligations.

But, as the appellant helped to impose the tax, and otherwise ratified it, he was under an honorary obligation to his fellow-citizens who, therefore, paid their portions of it, to contribute his share of the self-imposed burthen.

A payment of a debt barred by limitation can never be recovered back on a plea of mistake of law or of fact.

There was an honorary obligation to pay, and the law would rather presume that, therefore, payment would have been made had there been no mistake as to the bar. So here, and especially as the appellant paid only what he induced others to pay, whom, therefore, it was his duty to help, and also as the payment relieved other property of increased taxation.

We are therefore of opinion that the law, on the facts exhibited, does not imply a promise of restitution, and the judgment is therefore affirmed.

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CASE 42—PETITION ORDINARY—OCTOBER 19.

Payne, &c., vs. Richardson.

APPEAL FROM MEADE CIRCUIT COURT.

1. The owners of slaves, who voluntarily put them in the Federal army as substitutes in 1864, thereby waived their right to compensation for their value, and emancipated them by their own acts.
2. Slaves, voluntarily put in the Federal army in 1864, as substitutes, by their owners, thereby became free and able to contract.

WM. ALEXANDER, For Appellants,

CITED—

2 *Duvall*, 193–202; *Corbin vs. Marsh.*

3 *Mct.*, 176–7; *Smith, &c., vs. Gower.*

JOHN C. WALKER, For Appellee,

CITED—

Civil Code, scc. 125.

16 *B. Mon.*, 335; *Clark vs. Finnell.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Appellee brought this action against appellants, alleging that, in 1864, he loaned to Stuart Payne fifty dollars, which he promised to pay him again; but that, soon after said loan was made, said Stuart Payne died intestate and childless; that no administration had been granted on his estate; but that appellant, Solomon Payne, took possession of all the effects and estate of decedent, which were more than sufficient to pay him his debt, interest, and costs, and claims the whole estate as heir-at-law of said intestate. That he had placed funds in the hands of

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appellant, Alexander, which are a part of said intestate's estate, more than enough to pay his demend; that said Solomon Payne is a non-resident, and appellee attached in the hands of Alexander so much as was necessary to pay him. Both defendants answered, and denied that intestate had borrowed the money of appellee, or that they had any knowledge or information on the subject; and allege that if he did in fact borrow the money at the date of the transaction, the lender and borrower were slaves, incapable of contracting. and that the alleged transaction was not legally binding, and that Stuart Payne died before the adoption of the Constitutional Amendment, by which slaves were emancipated. The action was tried in the quarterly court where it was instituted, and a judgment was rendered for appellee. An appeal was taken to the circuit court, where the judgment was affirmed, and from the last judgment an appeal is prosecuted to this court.

From the proof there can be no controversy as to the borrowing of the money by intestate; and it appears from the evidence that appellee and decedent were enlisted and put into the army of the United States in October, 1864, by their then masters, or with their consent, they then being slaves, and were, at the date of the transaction, which caused this litigation, colored soldiers, mustered into the service of the United States; and if they thereby became free men, the judgment must be affirmed.

In *Corbin vs. Marsh* (2 *Duvall*, 193), the question involved was the constitutionality of the act of Congress for emancipating the wives and children of slaves volunteering as soldiers in the Federal army, and in that case a majority of this court decided that Congress had no such constitutional power. It was there admitted by

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the court that the Federal Government had the power to take slaves into military service, as any other private property might be taken for any other public use; but the power to *emancipate* the soldier slave was denied; that, however, was said *arguendo*, as that question was not directly before the court for adjudication.

But the case now before the court is very different from the one referred to. Here the owner of Stuart Payne, at the time he entered the service, was examined as a witness, and proves that he and appellee were put into the service by their owners as substitutes, whether for their masters or for others, he does not state; but they went in, not only with the consent of the owners, but by their authority; and while they were received by the government, it cannot be said that they were *taken* from their owners in disregard of their rights; and by putting them in voluntarily, they thereby waived their right to compensation for their value, and emancipated them by their own acts; consequently, at the time the contract was made, the parties thereto were free and able to contract.

Prior to the institution of this action the appellant, Solomon Payne, had been emancipated by the Thirteenth Constitutional Amendment, and as such might sue and be sued.

Wherefore, the judgment must be affirmed.

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CASE 43—APPRENTICING—OCTOBER 20.

Chaudet vs. Stone.

APPEAL FROM MARSHALL COMMON PLEAS COURT.

An order of the county court, binding a child as an apprentice, should *exhibit the facts required by law*, for giving jurisdiction to the court. If these facts are not stated in the order, *it is void.* (*Small vs. Small*, 2 *Bush*, 45; *Freeman vs. Strong, &c.*, 6 *Dana*, 283.)

PALMER, For Appellant.

[Brief missing.]

J. C. GILBERT, For Appellee,

CITED—

Revised Statutes, secs. 1, 2, *art.* 1, *chap.* 64, 2 *Stanton*, 136.

Revised Statutes, secs. 1, 2, *art.* 3, *chap.* 86, 2 *Stanton*, 304.

Revised Statutes, sec. 1, *art.* 2, *chap.* 37, 1 *Stanton*, 502.

Revised Statutes, sec. 27, *chap.* 106, 2 *Stanton*, 465.

Hardin, 442; *Davis vs. Ditto.*

4 *Bibb*, 336; *Watson vs. Morrison.*

4 *Bibb*, 86; *McIlvoy vs. Speed.*

4 *Bibb*, 510; *Wallace vs. Usher.*

1 *Met.*, 282; *Todd vs. Dowd's heirs.*

1 *Duvall*, 350; *Thornton vs. McGrath.*

Civil Code, sec. 543.

2 *Duvall*, 83; *Robinson vs. Redman.*

15 *B. Mon.*, 502; *Bakers vs. Winfrey.*

Lit. S. Cases, 220; *Parsons vs. Hand.*

2 *Mon.*, 151; *Bell, &c., vs. Chapell.*

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4 *Dana*, 336; *Venable vs. McDonald.*
13 *B. Mon.*, 306–11; *Stevenson vs. Huddleson.*
2 *Met.*, 452; *Harvey vs. Payne.*
3 *Mar.*, 254; 6 *Dana*, 87–8.
4 *J. J. Mar.*, 639; 4 *Dana*, 436.
Act of 1793, *M. & B.*, 1161.
6 *Dana*, 283; *Freeman vs. Strong.*
2 *Bush*, 46; *Small vs. Small.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

Whether the order of the county court directing Bob Stone to be bound to the appellant was or not void for want of jurisdiction shown therein, is the principal question for the decision of this court on this appeal. It may be conceded, that however erroneous the proceedings and order of the county court may have been, yet, if the order be not void, it was sufficient, while unreversed, to invest the appellant with the control of said boy Bob, and gave him a right to maintain an action for a violation of his rights as the master of Bob under the statute; but if the said order was void, the appellant could not recover in this action.

As was held in *Small vs. Small* (2 *Bush*, 45), "the provisions of the act of 1793 (2 *S. L.*, 1161), prescribing the mode and causes for which certain poor children may be bound as apprentices, are substantially re-enacted by the 1st and 2d sections of article 1 of chapter 64 of the Revised Statutes (*vol.* 2, 136), by which the court is authorized to put in apprenticeship *such poor orphans and other children* within its knowledge, whose relations or parents the court shall judge will not bring them up in moral courses."

And in the case referred to, and others, this court has recognized its former adjudications, in cases involving

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the construction of the act of 1793, as applicable to its provisions, as substantially re-enacted in the Revised Statutes, particularly in the case of *Freeman vs. Strong, &c.* (6 *Dana*, 283), in which it was said: "As the jurisdiction of the county courts over orphans and poor free children, colored and white, whose parents are unable or unfit to rear them properly, is limited and special, every order for binding a child as an apprentice should exhibit the facts required by law for giving jurisdiction."

Testing the order of the Marshall county court in this case by the rule announced in *Freeman vs. Strong, &c.*, it must be regarded as void for want of jurisdiction. It is not shown in the order, nor otherwise by the proceedings of the county court, that the boy was either an orphan or that he had not parents or relatives who would bring him up in moral courses.

It results from this conclusion, without examining in detail the various rulings of the court which are complained of, that the judgment is erroneous, and must be reversed.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

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CASE 44—APPRENTICING—OCTOBER 20.

Lamb, &c., vs. Lamb.

APPEAL FROM TODD CIRCUIT COURT.

In apprenticing negro or mulatto orphan children, it is the duty of the county court under the act of February 16, 1866 (*Myers' Supplement*, 729), to give the preference to the former owner, if he requests it, provided he is a suitable person.

W. L. & J. C. REEVES, For Appellants,

CITED—

Revised Statutes, secs. 1, 2, *art.* 1, *chap.* 64; *sec.* 7, *art.* 1, *chap.* 43.

15 *B. Mon.*, 506; *Baker vs. Winfrey, &c.*

1 *Bush*, 85; *Thomas, &c., vs. Newcom.*

Act of February 16, 1866.

2 *Bush*, 48; *Small vs. Small.*

KENNEDY & TERRY, For appellee,

CITED—

Revised Statutes, Myers' Supplement, 730.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Upon an examination of the order binding the two boys, Henry and Wesley Lamb, it is found to state all the facts under the statute necessary to give the county court jurisdiction to apprentice them; and it appears from the evidence that they have no parents, and that the master to whom they were bound is a man of good moral character, with the means to provide well for their comfort, and qualified to bring them up in moral courses;

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teach them industrious habits; and, furthermore, that he was their former owner, they having been slaves until the adoption of the Constitutional Amendment, by which they were emancipated.

The two colored men who resisted the order, one of whom is the uncle and the other married the aunt of the boys, have shown themselves to be men of good character and industrious habits; but one of them has a large family of children, and does not own a residence, and neither of them is shown to be as competent to take charge of the boys as the man to whom they are bound. And, in addition to the facts stated by the fourth section of the act of 16th February, 1866, entitled "*An act to amend article* 1, *chapter* 64, *Revised Statutes, title* '*Master and Apprentice*'" (*Myers' Sup.*, 729), it is provided that when a minor is a negro or a mulatto, it shall be the duty of the court, in apprenticing such minor, to give the preference to the former owner of said minor if the owner shall request it, provided he shall be a suitable person. It was therefore the duty of the court to bind the orphans to appellee.

Wherefore, the order and judgment of the county court are *affirmed*.

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CASE 45—PETITION EQUITY—DECEMBER 5.

Humphrey, &c., vs. Burnside, &c.

APPEAL FROM GARRARD CIRCUIT COURT.

1. In the division of the Methodist Episcopal Church of the United States in 1844, the local societies and church property in Kentucky passed to the Methodist Episcopal Church, South, except those churches and societies bordering on the Ohio river, which were permitted to determine the question whether they would go North or South, by a vote of the respective societies.
2. The plan of the separation of the Methodist Episcopal Church of the United States in 1844; that the separation was authoritatively consummated; and that the Southern conferences assumed an independent organization, under the name of the General Conference of the Methodist Episcopal Church, South; must now be regarded as adjudged questions.
3. A suit may be maintained in behalf of a church congregation in reference to the church property, by the trustees of the church, or by a committee appointed for that purpose by the congregation.

S. TURNER, For Appellants,

CITED—

Revised Statutes, 1 *Stanton*, 236, 465–6.

9 *B. Mon.*, 19; 7 *B. Mon.*, 481.

DURHAM & JACOBS, For Appellees,

CITED—

7 *Dana*, 195; 8 *B. Mon.*, 77, 78.

7 *B. Mon.*, 490; *Gibson, &c., vs. Armstrong, &c.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Appellees instituted this action against appellants, alleging that they are the legally constituted trustees of a local congregation of the *Methodist Episcopal Church*,

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South, worshiping at *Mt. Olivet*, in Garrard county, and as such trustees, hold the legal title to the church building, known as *Mt. Olivet*, in said county, for the exclusive use of said congregation to worship in, of which they are also members.

They further allege that said building, with about two acres of ground attached, had been in the uninterrupted possession of themselves and their predecessors, and the members worshiping there, for a period of more than twenty years, before this action was brought; that the ministers who have officiated there during that time have been supplied by the *Kentucky Conference*, which is under the control and jurisdiction of the *General Conference of the Methodist Episcopal Church, South;* that H. R. Coleman, the minister then preaching to them statedly, was sent there by said *Kentucky Conference*, and that no minister, unless he is under the control of the *Kentucky Conference*, or the *General Conference* of the *Methodist Episcopal Church, South*, has any right to occupy said house, or to preach there without the permission of said trustees; but that appellant, Humphrey, who is not a minister belonging to the Kentucky Conference, nor of the General Conference of the *Methodist Episcopal Church, South*, had, with the other appellants, on several occasions recently, before the bringing said action, forcibly, and against the will of said trustees and of said congregation, and without right, entered said house, and occupied it (as they allege) for religious worship.

That said church property was, *in* 1840, conveyed by the owner of the land to certain persons named in the deed, as trustees of the Methodist Episcopal Church; but that, since the date of said conveyance, viz: in the year 1844, the *General Conference of the United States*, with the concurrent action of the *Conferences of the Southern States*,

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adopted terms of separation, and according to these terms an organization was formed independent of the *General Conference* of the *United States*, composed of the *Southern* Conferences, denominated the *Methodist Episcopal Church, South*. That, by reason of said separation, and the terms thereof, nearly all the churches in Kentucky, Mt. Olivet included, became integral parts of, and the church property passed to, the *Methodist Episcopal Church, South*, and that the congregation of Mt. Olivet has ever since been supplied with preachers by the *Kentucky Conference*, which belongs to, and is under the jurisdiction of, the *General Conference* of the *M. E. Church, South;* and they, therefore, pray that appellants and all others may be perpetually enjoined from opening and using said church-house and grounds, or in any manner interfering with and disturbing them in their rights, without the consent of said trustees.

An answer and cross-petition was filed by appellants, in which they deny that appellees "are the legal trustees of the *Methodist Episcopal Church* at *Mt. Olivet, in Garrard county, Kentucky*," and deny that they were elected as such by the regular constituted authorities of said church members; they also deny that they are the legal title-holders of said church-house and grounds for the use and benefit of the members of said church worshiping there; but admit that said house and grounds have been in the possession of *said* officers and others for a number of years—the precise length of time, however, they do not admit; they admit that some of the ministers who have expounded the gospel there have been sent by the *Kentucky Conference*, but say that has not been exclusively the case, though they admit the minister who was then officiating there was sent to the congregation by said *Kentucky Conference*. They deny that appellants,

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by virtue of their "*pretended* office" (as they designate it), have the entire control of the property; and that other ministers of the Gospel, sent by other religious denominations or organizations, have no right to enter said house to preach; and that they and others have no right to occupy the house, unless permitted by appellees or the *Kentucky Conference.*

They allege that they and others worshiping there, except Humphrey, have been members of the *Methodist Episcopal Church* at Mt. Olivet, for a number of years, worshiping there, paying their dues, and being in regular communion with the other members of the church; that they have, within the last year or two, differed with other members of said congregation in some doctrinal points and in some points in relation to church government, and on that account had prepared to worship in the *Mt. Olivet* church separately, though peaceably, from appellees "*and their followers,*" and to that end said Humphrey had been sent to them by the proper constituted church authority, who is acceptable to them; and they claim to have a right to the use of the house superior to that of appellees, and those associated with them; they admit that they did enter said house to worship there, and intended to continue to do so, if they had not been prevented by the restraining order of the court. They exhibit the deed by which the property was dedicated to and is held for religious worship, and insist that, according to its terms, they cannot be legally excluded from the use of the house. They admit that about the year 1844 a separation occurred in the *Methodist Episcopal Church of the United States*, and a division of the church property was agreed upon by the church authorities; but they state that the appellants and appellees continued to worship peaceably together at the *Mt. Olivet* house for more than twen-

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ty years after said separation, and that appellants, and those agreeing with them, had not changed their church discipline or doctrine, but that appellees *had* changed, and now claim to be the only *Methodist Episcopal Church*, and seek to exclude all others from hearing the Word of God except as they teach it.

Appellants allege that they are acting with, and under the authority of, the *Methodist Episcopal Church*, and as such have a right to occupy and control the church property at Mt. Olivet, and pray the court to adjudge to them the exclusive right to occupy and use said property; but if the court should decide that it could not so adjudge, then they claim that the case presents a schism, or division of the church, and, under the statute upon the subject, the court should adjudge each party the use of the house and appurtenances a part of the time, in proportion to their respective numbers; and for that purpose make their answer a cross-petition.

Appellees, in a reply to the cross-petition, deny at length the right to a division of the time for the use of the house and appurtenances, for reasons not necessary to be recited here.

On final hearing, the relief sought by appellees was granted to them, and the cross-petition of appellants was dismissed with costs, and that judgment they now seek to reverse.

It is insisted—*First*. That the court below erred in overruling appellants' objections to parol evidence of the appointment of a portion of appellees as trustees for said congregation.

The former owner of the land on which the church-house stands, in consideration of twenty dollars, on the 20th of March, 1840, conveyed two acres, by specified

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metes and bounds, to nine named trustees, on the following trusts:

"*First.* That they should erect, or cause to be erected thereon, a house or place of worship for the use of the members of the Methodist Episcopal Church, in the *United States of America;* and in further trust and confidence that they shall, at all times thereafter, permit such ministers and preachers belonging to the church as shall, from time to time, be duly authorized by General Conference of the ministers and preachers * * * * of the said Methodist Episcopal Church, or by the Annual Conference authorized by the said General Conference to preach and expound God's holy word therein; and in further trust and confidence, that, as often as any one or more of the trustees hereinbefore mentioned shall die or cease to be a member or members of the said church, according to the rules and discipline as aforesaid of the Methodist Episcopal Church, then and in such case it shall be the duty of the stationed minister or preacher authorized as aforesaid, who shall have the charge of the members of said church, to call a meeting of the remaining trustees as soon as may be convenient, and when so meeting, the said minister or preacher shall proceed to nominate one or more persons to fill the place or places of him or them whose office or offices has or have been vacated as aforesaid, provided the person or persons so nominated shall have been one year a member or members of said *Methodist Episcopal Church* immediately preceding such nomination, and be at least twenty-one years old; and the said trustees so assembled shall proceed to elect, and by a majority of votes, appoint the person or persons so nominated to fill such vacancy or vacancies, in order to keep up the number to nine forever; and in case of an equal number of votes for and

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against such nomination, the stationed minister or preacher shall have the casting vote."

The residue of the deed relates to the manner the trustees, or any of them who may expend money or incur debts for the erection of the building, or other necessary outlays of money, shall be repaid and indemnified, and the disposition of any surplus that may remain in case a sale of the premises should be necessary, after satisfying the debts and liabilities of said trustees.

It appears from the testimony of Thomas J. Overstreet, who was, when he testified, and had been for a number of years previously thereto, a member of the local congregation worshiping at Mt. Olivet, that John Brown, William Ford, and William Kersey, three of the original trustees named in the deed, were dead before the election of 1865, at which some of the appellees were elected, and that Martin Jackson and James Isom, two others of the original trustees, had removed, and were not members. At the time of said election there were but three trustees, Burnside, Hamilton, and Campbell, and to fill the vacancies then existing it was deemed necessary to elect six trustees, and that number was elected on the 12th of August, 1865.

This witness further testified that he was, and had been for five years previously, recording steward of Bryantsville circuit, and secretary of the Mount Olivet congregation; that, by virtue of his office, he is the custodian of the record of the proceedings of said congregation, or such as are required to be entered of record; and that an election of trustees to fill said vacancies is shown by an order of record, a copy of which he inserts in his deposition in the following words:

"On motion, the following persons were elected to fill vacancies in the board of trustees of Mount Olivet Church,

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to-wit: Wm. Lane, W. F. Overstreet, Asa S. Brown, H. Z. Perkins, Thos. Poor, J. C. England; original trustees, Wm. Burnsides, Isham Hamilton, and W. H. Campbell."

That on the 12th of January, 1867, J. W. Poor was elected to fill the vacancy occasioned by the withdrawal of W. H. Campbell; and on the 16th of the next March, Daniel Swope was elected to fill the vacancy caused by the withdrawal of Asa S. Brown, which facts the witness states the record shows, and which he then had.

The action, as the caption of the petition shows, is prosecuted in the names of Hamilton and Burnside two of the original trustees, and of those since appointed, in the manner herein detailed; but as the last appointments were not recorded in the county court, and a greater number appointed than that prescribed by the statute, we may say the legal title to the church property remained in the three surviving trustees. But whether it is in them or in appellees is not deemed material in this controversy; for if they are not in fact the title-holders, they should be regarded as a committee suing by the appointment, and on behalf of the congregation, to protect it from the disturbance of others, in the use and enjoyment of their property.

In the case of *Hadden and others against Chorn, &c.* (8 *B. Mon.*, 70), this court held that a committee appointed by a church or denomination of Christians might maintain an action to protect the congregation from disturbance in their rights, independent of the statute of 1835. And the Revised Statutes do not abrogate or abridge that right; and whether the persons suing be styled or call themselves trustees or a committee, cannot affect the right, and is immaterial to appellants.

The appointment doubtless was made for the express purpose of prosecuting this suit; and, according to the

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ruling in *Hadden, &c., vs. Chorn, &c., supra*, no other evidence was necessary than the entry of their appointment on the record kept by their secretary.

In the last named case, Chorn, one of the trustees to whom the property was conveyed, had been excluded, and Farrow, another trustee, was dead, and Harmon and Garrett were appointed in their place; but the county court refused to permit their appointment to be recorded. Afterwards, a committee was appointed by the complaining party to institute the suit, and it does not appear that there was any record of the appointment of said committee, even on the church-book—certainly it was not recorded in the county court. Still, this court decided that said committee could maintain the action. And the question was ruled in the same way in the case of *Shannon, &c., vs. Frost* (3 *B. Mon.*, 353).

Nor is the case of *Scott, &c., vs. Curle* (9 *B. Mon.*, 19), referred to by appellants' counsel, in conflict with these authorities. In that case three persons, not associated together in a congregational form, and never had been so associated, attempted to appoint Scott and Sadler trustees, who were not and had never been members of the church. The three persons from whom they derived their authority acted merely in their individual characters as members of the Bethlehem Church; and the court only decided in that case, that as Scott and Sadler, who brought the action, were not officers nor members of the Bethlehem Church, and were not themselves beneficiaries, and had not been properly appointed "trustees or a committee for it," they had no right to sue.

But it is contended that the appellees had no right to bring this suit, because they have not alleged that they are members of said congregations, and do not show that they are beneficiaries under the deed; and unless

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they be members, they could not sue as a committee *for the beneficiaries*. We are not aware of any case in which it has been decided that the members of a committee, appointed to prosecute a suit of this character for a religious congregation, must be members of that congregation, nor can we perceive any reason for such an adjudication; cases might occur where it would be altogether proper to procure the services of persons as a committee who did not belong to the congregation; they act as the mere agents, and it would seem as reasonable to restrict the congregation to their own membership in the selection of an attorney as thus to restrict them in the selection of a committee; but no one except a member could sue in his own individual name, because the members are the only beneficiaries under the deed. But that question need not be now decided, because the answer has supplied any omission in the petition on that point.

It is next insisted that the court below erred in admitting the published proceedings of the *General Conference of the Methodist Episcopal Church, from* 1840 to 1844, as evidence, without sufficient proof having been made of their authentication.

In stating the pleadings, it has already been shown that appellants admit, in their answer, that about the year 1840 a "*split*" occurred in the Methodist Episcopal Church of the United States, and that a division of the church property was then agreed upon by the "*great church dignitaries;*" and although all of said proceedings were admitted as evidence, still only so much thereof as contained the conventional terms for dividing that great religious body was material, and was all that was read, which is designated as exhibit "*A*," and made part of the deposition of Rev. G. W. Merritt,

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who proves the same to be a true and correct copy from said published proceedings, taken from *volume two of the journals*, and that said extract contains "the plan of separation" "between the *Northern* and *Southern Churches*," and the plan under which the *Methodist Episcopal* Church, South was formed, and proves, inferentially at least, that the document offered and admitted was a true copy of the proceedings of the General Conference of the Methodist Episcopal Church. And the whole of it was, doubtless, admitted under the rule, that where a part of a document is produced and read by one party, the whole is to be read if the adversary require it.

But this court, in *Gibson, &c., vs. Armstrong, &c.* (7 *B. Mon.*, 481), decided that the resolutions, which constitute exhibit "*A*" before referred to, and to which the objection now under consideration applies, were adopted in 1844 by the *General Conference of the Methodist Episcopal Church;* the first and second of which are copied in full, and the substance of the others stated in the opinion; and that the plan of separation, and the condition on which it was to take effect, were laid down in the first of said resolutions; that the separation was authoritatively consummated, and the Southern Conferences had, under said resolutions, assumed an independent organization, under the name of the *General Conference of the Methodist Episcopal Church, South*. It is true it does not appear that the evidence was objected to in that case, but it was received and acted upon, and must now be regarded as an adjudged question.

The separation of the Methodist Episcopal Church into two Methodist Episcopal Churches, the one north and the other south of a common boundary line, has been the

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subject of much discussion, in which the whole community, more or less, felt an interest, and was an event that connected itself with, and formed a part of, the history of the country, of which no well-informed man could be ignorant, and from its notoriety, courts would take judicial notice of it without proof. (*Hart vs. Bodley*, *Har.*, 98; *Creighton vs. Bilbo*, 1 *Mon.*, 138.)

Finally, it is urged that the appellants, under the provisions of the deed, are entitled to the exclusive use of the property, or certainly to the use of it a part of the time, proportionate to their numbers. The provisions of the deed under which the property was held, which was the subject of controversy in the case of *Gibson, &c., vs. Armstrong, &c., supra*, are substantially the same as those in the deed under which the *Mt. Olivet* church property was held. The court said, in that case, "the original Methodist Episcopal Church has been *authoritatively divided* into two *Methodist Episcopal Churches, the one north and the other south* of a common boundary line, which, according to the plan of separation, limits the extent and jurisdiction of each; that each, within its own limits, is the lawful successor and representative of the original church, possessing all its jurisdiction, and entitled to its name; that neither has any more right to exceed those limits than the other; that the *Southern Church*, retaining the same faith, doctrine, and discipline, and assuming the same organization and name as the original church, is not only a Methodist Episcopal Church, but is in fact, to the South, *the* Methodist Episcopal Church as truly as the other church is so to the North, and is not the less so by the addition of the word South to designate its locality."

"The difference in name makes no difference in character or authority." According to the plan of division,

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the local societies in Kentucky passed to the Methodist Episcopal Church, South, except those bordering on the Ohio river, which were permitted to determine the question, whether they would go north or south, by a vote of the respective societies. The congregation at Mt. Olivet adhered to the M. E. Church, South, acknowledged its jurisdiction, and received its preachers from the Kentucky Conferences for more than twenty years without complaint or objection, a portion of which time appellant Humphrey served them as their minister, being then a member of the Kentucky Conference, by which conference he was sent to them. But a short time before this action was brought he withdrew from the Kentucky Conference, of which he notified Coleman, the minister then preaching to said congregation, by writing bearing date the 25th October, 1866; and he, with a few who withdrew about that time from the congregation, rejects the Kentucky Conference, and professes an adherence to the *Methodist Episcopal Church*. After discussing the question at length, in the opinion referred to, this court, in conclusion, said: The property conveyed and held for the use of the members of the original society, as members of the Methodist Episcopal Church, having, by the deed, been subjected to the same authority and laws to which the society and its members, entitled to the use, were subject, it follows that the same legislation, and the action under it, which have determined the true position and relation of the society entitled to the use, have also determined the authority to which the use itself is properly subject, and have placed the use under the jurisdiction and legislation of the Southern Church, and adjudged the majority, with their preacher from the Kentucky Conference, entitled to the use of the property to the exclusion of the minority. Although the opinion quoted

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from was delivered prior to the adoption of the *Revised Statutes*, still the previous statutes, upon the point under consideration, were not materially changed thereby, and the determination in that case must be regarded as conclusive of this.

Wherefore, the judgment is *affirmed*.

CASE 46—PETITION EQUITY—DECEMBER 1.

Lewis, &c., vs. Watson, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. By seceding from the Methodist Episcopal Church, South, the majority of the members of the Centre Street African Church, in Louisville, thus seceding, forfeited their right to the church property, and those, although a minority, who remained members of the Church, South, are the only rightful beneficiaries of said church property, and are entitled to its exclusive use.
2. The title to the three parcels of the lot on which Centre Street African Church in the city of Louisville was erected, by deeds made in 1832 and 1845, and an executory contract in 1854, was vested in the white trustees, and their successors of the Fourth, now the Fifth Street Methodist Episcopal Church, South, in said city, for the sole use of the colored members of the Centre Street branch of that church. If all the colored members of said Centre Street Church had seceded and joined the Church North, they could not have taken the property with them, but would have left it as dedicated to the use and control of the Methodist Episcopal Church, South.

JAMES SPEED, For Appellants.

J. F. & T. W. BULLITT, and
HARRISON & BENNETT, For Appellees.

CITED—

7 *B. Mon.*, 489–90; *Gibson vs. Armstrong.*

Book of Discipline M. E. C., South, pages 43, 53, 107, 262.

8 *B. Mon.*, 76; *Hadden, &c., vs. Chorn, &c.*

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5 *Wright*, 12; *McGinnis vs. Watson.*
6 *Wright*, 512; *Sutter vs. Dutch Church.*
2 *Denio*, 540; *Miller vs. Goble.*
4 *Wheaton*, 603; *Commonwealth vs. Green.*
Revised Statutes, chap. 107, 2 *Stanton*, 407.
Civil Code, secs. 37, 153; 11 *Peters*, 584.
3 *B. Mon.*, 258; *Shannon vs. Frost, &c.*
11 *B. Mon.*, 287; *Berry vs. Rees.*
14 *B. Mon.*, 55; *Harper vs. Straws.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

This appeal presents for our revision a judgment, by the chancellor of the city of Louisville, on conflicting claims by antagonist members of the Methodist Church on Centre street, in that city, to the exclusive use of the church property. All the members of that church are colored persons, most of whom were, until lately, slaves. A minority of the members adhere to "the Methodist Episcopal Church, South;" but the majority, having recently seceded and joined the Methodist organization North, have evicted them from the possession and use of the church property, for restoration to the exclusive enjoyment of which the ejected party brought this suit in equity, and obtained a decree as sought by their petition.

In the year 1832, when colored Methodists, mostly slaves, were under the charge of the white Methodist Church then on Fourth, now on Fifth street, W. T. Spurrier and his wife conveyed a lot of ground on Centre street, thirty-five feet front and sixty feet back, to Coleman Daniel and others, and to their successors, as trustees of said church, to hold forever in trust, to build, or cause to be built, a house of worship, for the use of the Methodist Episcopal Church of the United States; to *permit* such preachers to preach therein as should be appointed for that purpose by the general or authorized Annual Con-

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ference of said church, and to keep up the succession of trustees by successive appointments by the board itself, in a prescribed mode.

In the year 1845, the same vendors sold and conveyed an additional and adjoining lot of twenty-seven feet front and sixty feet back, to Hasbrook and others, white "trustees of the Methodist Episcopal Church, *South*, for the use and benefit of the African members of said church," to hold forever in trust "for the use of the African members of the Fourth Street former charge, and a part of the mission of colored people worshiping on Centre, now under the direction of the Methodist Episcopal Church, South, and in further trust and confidence that they shall, at all times, *permit* such ministers and preachers belonging to said church as shall, from time to time, be duly authorized by the General Conference of the ministers and preachers of said Methodist Episcopal Church, South, or by the Annual Conferences authorized by said General Conference, to preach and expound God's holy word therein;" and in further trust and confidence that the succession in said board of trustees shall be continued in a prescribed mode by the board itself, *always to consist of white members.*

About the year 1854, Mary H. McGinnis, for the consideration of one thousand dollars, sold and covenanted to convey to the same uses an additional and adjoining lot of eighteen feet front by sixty feet back; and in 1865 she conveyed the legal title to appellant, Peter Lewis, and others, colored persons of the seceding party claiming to be "trustees of the Centre Street Methodist Episcopal Church;" and a part of the church building is on the grounds thus conveyed.

It thus sufficiently appears that the first conveyance was constructively made for the prospective use of the colored members of the Fourth Street Methodist Church,

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and was so dedicated and used; that the second conveyance, shortly after the separate organization of "the Methodist Episcopal Church, South," was expressly made for the benefit of the same colored members who, by the compact of separation and their own acquiescence, became an integral element of that Southern Church, and subject to its ecclesiastical curation and jurisdiction, and that the last purchase was intended for the same use; and, consequently, the trusts declared in the deed of 1845 apply equally to all the ground bought for that use.

As adjudged by this court in the case of *Gibson vs. Armstrong* (7 *B. Mon.*), the conventional division of the Methodist Episcopal Church of the United States into two sections, North and South, and the independent organization of "The Methodist Episcopal Church, South," were constitutional and effectual, and passed the Fourth Street Methodist Church and its dependent African Church, with all their church property, under the exclusive jurisdiction of the southern organization; and, therefore, as also adjudged in the same case, the members of those subordinate and affiliated churches held a beneficial interest in the church property so long, and only so long, as they continued members also of the Methodist Episcopal Church, South. Consequently, by seceding from that sectional church, the appellants, claiming as a majority, dominion over the property dedicated to the African Church on Centre, as an appendage of the Methodist Episcopal Church, South, forfeited their right to that property, and, by wrongfully assuming control over it, intruded on the exclusive rights of the only rightful beneficiaries who remain members of the great Southern Church.

While this has not been gravely controverted, the distinguished counsel of the appellants insist on a reversal

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of the chancellor's judgment, because, as ingeniously argued, the petition fails to allege all the facts necessary to entitle them to the relief granted; but the facts, as alleged and admitted, sustain the chancellor's decree requiring a surrender of the church property to the trustees of the Fourth Street Church, to be held for the sole use of colored members of the Centre branch of the Methodist Episcopal Church, South. Those facts and admissions, consistently interpreted, show that the appellees, when evicted, were members of the Centre African Church, then attached to the southern organization; that none but white members could be lawful trustees; and that the litigant successors of the trustees to whom the legal title was conveyed by the deeds of 1832 and 1845, are white members of the Methodist Episcopal Church, South, and the only rightful trustees of the Centre Street station of the colored members of the same church. But, even if this had not been alleged, the chancellor, having authority to appoint proper trustees to hold the title, virtually appointed, by effectual recognition at least, those to whom he decreed the restitution of possession for the exclusive use of the only beneficiaries equitably entitled thereto.

Yet, still the counsel of appellants argue that the allegation that, for some time, no preacher had been appointed by the conference for the Centre Church, and that, consequently, the ruling majority of its actual members had chosen their pastor, shows that the Methodist Episcopal Church, South, had renounced all connection with the Centre station, or that the latter had assumed independence, and is no longer subject to the jurisdiction of the conference; and that, therefore, the majority had a right to join the northern section as they did, or to maintain an isolated position and exercise uncontrolled dominion

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over the property dedicated to the use of members of the Methodist Episcopal Church, South.

But this is an indefensible assumption, unsustained by either facts or law. The trust, as to this matter, only makes it the duty of the Centre Street Church to "permit" the conference to select its pastors, and to accept such as it may recommend, which obviously implies the inherent right in the majority of that society to choose its own preachers, subject only to the paramount choice of the conference, whenever it may see fit to choose. If the conference forbear to exercise its discretionary and sometimes, perhaps, unwelcome power, and prudently defer to the more satisfactory choice of the local church itself, such abstinence cannot imply renunciation of constitutional union and dependence; and if any such baseless implication could be indulged, a conclusive refutation is furnished by the organic law of the Southern Church, which will not allow any such dissolution of the fundamental union of all its constituent parts and co-operating connections.

Besides, if there had been a valid dissolution, it would be unavailing to the appellants so far as the church property is concerned; for if all the members of the Centre Street Church had repudiated its constitutional dependence and connections and gone north, they could not have taken the property with them, but would have left it as dedicated, to the use and control of the Methodist Episcopal Church, South. And just so the seceding appellants left it to the exclusive use of the adhering appellees as abiding members of the Southern Church.

The chancellor's decree seems, therefore, right; and as it sufficiently secures the use to the rightful parties, without any necessity for a reconveyance of the legal title to the ground illegally and ineffectually conveyed by Mrs.

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McGinnis to black persons not members of the Southern Church, we will not, on the cross-errors, reverse merely because such formal and unnecessary reconveyance was not expressly required.

Wherefore, the entire judgment is approved and affirmed.

CASE 47—PETITION EQUITY—DECEMBER 1.

McDaniel vs. Watson, &c.

APPEAL FROM BALLARD CIRCUIT COURT.

1. It was fatally erroneous in the circuit court to adjudge a conveyance of an acre of land "*for church purposes, and for school purposes,*" when, in the writing on which the suit for the conveyance was based, the defendant agreed to make a voluntary dedication and conveyance *for church purposes only.*
2. If the congregation to whose uses the defendant agreed, in writing, to make a *voluntary dedication* and conveyance of one acre of land, on which the congregation erected a church building, had ceased to use and occupy the same for the purposes for which the dedication was made, as it would revert, if it had been conveyed, if such uses had failed before conveyance, *a fortiori*, the defendant would be under no obligation to convey.
3. To entitle the plaintiffs, trustees of the church, to whose uses the defendant had agreed, in writing, to make a voluntary dedication and conveyance of one acre of land, on which the congregation erected a church building, to a judgment for the conveyance thereof, they ought to have alleged in their petition that the congregation had used and occupied the church, and intended, in good faith, to continue to use and occupy the same for the purposes intended. Failing to make these allegations, the demurrer to the petition should have been sustained.

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P. D. YEIZER, For Appellant.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This action was brought by appellees, as trustees of Wesley Chapel, a congregation of the Methodist Episcopal Church, South, against appellant, to obtain the conveyance of an acre of ground on which said chapel is located, of which he is the legal title-holder.

It is alleged in the petition, in substance, that, by the discipline of said denomination of Christians, the houses of worship of each local congregation is required to be held by persons designated and properly constituted trustees, for the use of such local congregations, and that appellees are the legally constituted trustees for said chapel.

That, before the erection of said house, application was made to appellant (he then being a member of the Methodist Episcopal Church, South) for the ground to build it on; and he promised to donate an acre of ground for that purpose, and signed a writing, binding himself to convey one acre of ground upon which said house is located, to the use of the local congregation; that he not only saw the work while it was progressing, but aided in building the house on the corner of his land designated, and it was built there on the faith that he would convey the land according to his written agreement, whenever requested to do so. That the house was built at a cost of about five hundred dollars, and the congregation used the same as a house of worship for about five years, without objection on the part of appellant, he being a member of the church; but that recently, before the action was instituted, said McDaniel, with some other members of said local congregation, had seceded from a large majority of the church, and have

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attached themselves to the *Methodist Episcopal Church*, and claim said house and appurtenances, and deny that appellees have any right to the same. That appellant, McDaniel had removed two stoves, two barrels of lime, and about one thousand feet of lumber, from the premises, and appropriated the same to his own use, and he and his associates had notified appellees not to remove any thing from the house, and had refused to permit them to use it; and conclude with a prayer for a conveyance of the acre of ground on which the house is situate, and for the value of the stoves, lime, and lumber removed; and if they cannot obtain that relief, then they pray for a judgment for five hundred dollars, the cost of said building, and for general relief.

McDaniel demurred to the petition, which was overruled, and he then filed an answer, and joined with two others, claiming to be trustees of said chapel, in a petition to be made defendants to the action as trustees, and filed their answer and cross-petition, to which appellees demurred; their demurrer was sustained, and appellants failing to answer, further judgment was rendered against McDaniel, requiring him to convey to the plaintiffs below, in their character of trustees of Wesley Chapel, one acre of ground, on which said house stands, in proper form, "to be used and enjoyed by the community of Christians known as the Methodist Episcopal Church, South, for church and *school* purposes; and it is further adjudged by the court, that should the community of Christians known as the Methodist Episcopal Church, South, openly abandon said church house, and cease to use the same for church purposes, then, and in that case, the title is to revert, and vest in the said Aaron McDaniel;" and in case the title should again vest in him, the trustees of said community of Christians known as the Methodist Episcopal Church,

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South, shall have the right to remove from the land said house, and all property appertaining to the same, &c.; and if said McDaniel fails to make said conveyance, a commissioner was appointed to convey the property.

The controversy as to the lumber, lime, and stoves was continued, and to reverse the judgment for a conveyance of the title to the real estate this appeal is prosecuted by McDaniel.

It was fatally erroneous to require appellant to convey the ground "for *church and school purposes*," if the judgment was otherwise unobjectionable. It is not alleged that McDaniel ever undertook or promised, by writing or otherwise, to convey the land for school purposes. He might have been willing to dedicate his land to the benefit of the church, when he could not have been induced to agree that a school should be taught there. But, without undertaking to assign any reason why he might have refused to agree to dedicate his land to educational purposes, it is sufficient that it is not alleged that he did so, and the court had no power to make the dedication for him.

Again, although it is alleged that appellant promised, in writing, to convey the land for the use of the local congregation of the Methodist Episcopal Church, South, it is not, throughout the length of the very extended petition, once stated that said congregation had continued to use the house as a house of worship, or wished to do so; but, from the remarkable omission to make the allegation, and from the exhibit B filed as a part of the petition, and the failure to controvert the statement therein that appellees intended to remove the seats and flooring, it is rather to be understood that they had abandoned the house as a place of worship, and intended to appropriate the seats

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and floors to a different and unauthorized purpose, or to remove them to another house.

The alleged undertaking of McDaniel to convey the ground was not upon a valuable consideration, but a voluntary dedication thereof to the use of the congregation; consequently, if the congregation should cease to occupy it, and the uses to which it was dedicated wholly fail, the estate, if he had conveyed it, would revert to him or his heirs; and, *a fortiori*, if the use had failed before the conveyance was made, he would be under no obligations to convey the ground.

Unless appellees, and the local congregation which they represent, used and occupied said house for the purpose for which it was erected, as expressed in exhibit A filed with their petition, and in good faith intended to continue so to use and occupy it, they have no right to a conveyance of the ground, and to entitle them to the relief sought they should have alleged these facts; and having failed to do so, the demurrer to the petition should have been sustained.

Wherefore, the judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion. Appellees, upon the return of the cause, should be permitted to amend their petition, if they should offer to do so in reasonable time.

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CASE 48—PETITION EQUITY—DECEMBER 1.

Speers, &c., vs. Sewell, &c.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

1. The fact that, for a few years before his death, the intestate, who was about eighty years old, had occasional fits of nervous disturbance, which required some guardian care of himself and his business by an affectionate son, is altogether insufficient, against a multitude of established facts, to show that he was not competent to dispose of his estate, by contract and conveyances, rationally, justly, and prudently.
2. The father made an oral contract with his son John, whereby he agreed to convey to John his homestead tract of land, in consideration of John's living with him, attending to his business, and taking care of him and his wife during their lives. *Held*—As there was no written memorial of the contract, John could not, by suit, enforce a specific performance, although he had faithfully complied with his part of the contract; but he has a resisting equity not affected by the statute of frauds and perjuries. For his services, he has an equitable lien on the land, and cannot justly be required to surrender his rightful possession until he shall have been indemnified. Before decreeing dispossession and distribution of the homestead tract of land, the circuit court ought, through its commissioner, to have ascertained the value of John's services in his care and support of his father and mother, and of attention to his father's affairs, over and above his (John's) own maintenance; and, after such finding, John should be protected in the possession until the amount assessed shall have been paid.

JOHN M. HARLAN and
JAMES HARLAN, JR., For Appellants.

LESLIE & BOTTS, For Appellees.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Joseph Speers, of Cumberland county, Kentucky, who died intestate in that county in January, 1866, had, in

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April, 1861, conveyed to his son Benjamin a small tract of land, partly as a gift and partly for a valuable consideration; and in November, 1834, conveyed to the children of his son William another small tract as a gift; and, several years before the year 1860, had made an oral contract with his son, John W. Speers, whereby he agreed to convey to John his homestead tract, in consideration of John's living with him, attending to his business, and taking care of him and his wife during their lives.

At the intestate's death, Benjamin was living on the one hundred and seventy-five acres conveyed to him; William and his children were residing on the one hundred acres conveyed to those children; and John had so far faithfully fulfilled his engagement to live with and support his aged father and mother, and was carefully attending to his surviving mother and the farm when the appellee, Sewell, and his wife, a daughter of the deceased father, uniting with some of his grandchildren, brought this suit in equity for setting aside the conveyances, repudiating the contract with John, and distributing all the lands equally among all the decedent's heirs, on the alleged ground of incapacitating imbecility and sinister influence. On full preparation, the circuit court granted the relief sought, and the parties claiming under those contracts appealed from that decree.

The intestate was, at his death, about eighty years old, and the testimony, though voluminous and conflicting, preponderates, when rightly weighed, decidedly against the charges of incapacity and undue influence. Consisting chiefly of facts on one side and of vague opinions on the other side, it leaves no reasonable room for judicial doubt of either fairness or legal capacity, and authorizes the deduction that each of the three contracts was the

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result of a competent, free, and self-poised mind, executing a deliberate and long-considered purpose.

There is no proof of fraudulent or controlling influence in either of the contracts; and the fact that, for a few years before his death, the intestate had occasional fits of nervous disturbance, which required some guardian care of himself and his business by an affectionate son, is altogether insufficient, against a multitude of established facts, to show that he was not competent to dispose of his estate rationally, justly, and prudently.

Consequently, in the opinion of this court, the circuit court erred in canceling the conveyances to Benjamin Speer and to Wm. Speer's children.

As there was no written memorial of the contract for the conveyance of the homestead land to the appellant John, he could not, by suit, enforce a specific performance even on the meritorious ground of the strong moral equity resulting from his long and faithful services in execution of the promised consideration; but he has a resisting equity not affected by the statute of frauds and perjuries. For his services he has an equitable lien on the land, and cannot justly be required by a court of equity to surrender his rightful possession of the land until he shall have been indemnified. If the appellees avoid a conveyance, they must do so *cum oncre*. Before decreeing dispossession and distribution of the homestead tract, the circuit court therefore ought, through its commissioner, to have ascertained the value of John's services in his care and support of his father and mother, and of attention to his father's affairs over and above his (John's) own maintenance; and after such finding, John should be protected in the possession until the amount assessed shall have been paid.

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Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with instructions to dismiss so much of the petition as seeks a cancelment of the conveyances and a distribution of the lands conveyed to Benjamin Speers and the children of William Speers, and to institute proper proceedings for effectuating the principle of this opinion touching the homestead tract, and the rights of the appellant, John W. Speers.

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CASE 49—PETITION ORDINARY—DECEMBER 2.

Baer vs. The Phœnix Insurance Company.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. If the assured procures another insurance on the same property without having it indorsed on the first policy as therein required, the first insurer may avoid his contract and policy.
2. "*Void*," as recited in an insurance policy—*that if the same property had been or should be insured by any other company, without an indorsement thereof on this policy, its guaranty should be void, &c.*—"*void*," in such connection, means *voidable*, or *to be treated as void* by the insurer at his own exclusive option. Such violation of the policy by the insured did not render the policy an absolute nullity as to either party. The insurer might, by contract or conduct, waive the right to exoneration and become estopped from enforcing the conventional condition of forfeiture.
3. The assessment of a loss cannot be construed as more than a prelude to the ulterior decision by the insurer to pay or not to pay on full knowledge of all the preliminary facts, &c. The simple assent to the appraisement could not consistently imply a waiver of forfeiture, and especially as the ground of it was not then known to the insurer.

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MUIR & BIJUR, For Appellant,

CITED—

38 *Barb.*, 402; *Carroll vs. Charter Oak Ins. Co.*
5 *Hill*, 147; 5 *Denio*, 154.
2 *American Leading Cases*, 488.
25 *Barb.*, 191.
23 *Wendell*, 22; *Lightbody vs. North American Ins. Co.*
4 *Cowen*, 645; *Perkins vs. Wash. Ins. Co.*
2 *Kent's Com.*, 620.
25 *Barb.*, 191; *Goit vs. National Protection Ins. Co.*
1 *Smith's Leading Cases, Dumper case.*

WM. ATWOOD, For Appellee,

CITED—

20 *Indiana*, 520; *Rising Sun Ins. Co. vs. Slaughter.*
1 *Arnold on Ins.*, 291, 292.
Angell on Fire and Life Ins., secs, 140, 142, 143, 380.
Ellis on the Law of Fire and Life Ins., 28.
5 *Ohio*, 461; *Harris vs. The Ohio Ins. Co.*
21 *Mo. R.*, 97; *Hutchinson vs. Western Ins. Co.*
22 *N. Y.*, 402; *Bigler vs. N. Y. Central Ins. Co.*
16 *Peters*, 508–11; *Carpenter vs. Providence Wash. Ins. Co.*
3 *Robinson, La.*, 384; 12 *Cushing*, 469.
8 *Gray*, 33; *Kimble vs. Howard Ins. Co.*
7 *Cushing*, 175; *Barrett vs. Union Mutual Ins. Co.*
12 *Cushing*, 144; 6 *Gray*, 169.
41 *N. H.*, 175; *Gale vs. Belknap Ins. Co.*
23 *Pick.*, 418; *Jackson vs. Mass. Ins. Co.*
3 *Cushing*, 342; *Clark vs. New England Ins. Co.*
6 *Cowan*, 635; *Lucas vs. Jefferson Ins. Co.*
37 *Maine*, 137; 38 *Maine*, 439.
4 *Metcalfe, Ky.*, 9; *Phœnix Ins. Co. vs. Lawrence.*

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JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In this action by the appellant against the appellee on a policy of insurance, the court below instructed the jury to find for the appellee, and, on such finding, rendered judgment in bar of the action.

The policy, issued on the 21st of July, 1866, for an advanced premium of one hundred dollars, insured for one year, to the amount of five thousand dollars, goods in a brick house in the city of Vicksburg.

Among other stipulations, the policy contained the following, in substance and effect:

1. That in the event of loss by fire, immediate notice thereof should be given to the insurer; and, as soon thereafter as possible, the fact of loss by fire, and an assessment of the value of the goods consumed or damaged, authenticated by the owner's affidavit and a magistrate's certificate of his credibility, should be furnished to the company or its local agent before any action could be maintained for failing to pay the damage.

2. That the underwriters might at any time, on notice, cancel the policy.

3. That if the same property had been or should be insured by any other company, without an indorsement thereof on the appellee's policy, its guaranty should be "*void*."

It appeared on the trial that there were two other assurances of the same property—one by the "Home Insurance," indorsed on the appellee's policy, and the other by the "London, Liverpool, and Globe Insurance Company," unindorsed, and, so far as must be presumed, unknown to the appellee or its agent until he was notified of it after the fire.

It appeared also that the goods were burned on the 23d of December, 1866; that, on the 25th of the same

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month, arbitrators, chosen by the appellant and the agent of the Home company, and the local agent of the appellee, assessed the damage; that on the 11th of February, 1867, the appellee's agent refunded to the appellant forty-one dollars for the unexpired term, and that, thereupon, the policy was canceled; and the petition alleges that the two other companies had paid two thirds of the assessed loss.

It does not appear that the preliminary evidence prescribed in the policy was fully presented to the appellee's agent, but his conduct constructively waived a precise fulfillment of that requisition; and the only question worthy of grave consideration is, whether, under all the circumstances, the policy has been avoided, either by the unindorsed insurance or by the indorsed cancellation.

As, according to the provisions of this and other modern policies of insurance against fire, each of several insurers of the same property is proportionately contributory to the indemnity of the owner, three insurances in this case might seem, in one aspect, to be beneficial to the appellee by reducing its liability. But, in a more important phase, the interest of the company and public policy require the enforcement of the forfeiture for failing to notify its agent of the insurance, which was never indorsed as approved by the appellee. The object of that condition was to assure the underwriter against over insurance or insurance equivalent to the entire risk, whereby the insured, relieved of all risk, might be tempted to procure the loss, or to take no care to prevent it. To make it the interest of the insured as well as of the insurer to avert loss, no prudent underwriter ever insures for the full value of the property, but leaves the owner so far interested in preventing the loss as to assure his fidelity and vigilance in proper care to avert

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it. And cumulative insurances against the same risk may frustrate this provident aim, encourage fraud, and thus tend to discourage insurances and augment the percentage of premiums; and, as capital and enterprise are aided by fair and responsible insurances, the whole community is interested in the prevention of fraud by either party to a policy and the reduction of the rate of premiums; and, consequently, some such precautionary provision as that we are now considering is usual in American fire policies, and should be regarded and upheld by the judiciary as all other reasonable and proper stipulations in ordinary contracts.

But the term "void," in its technical sense, imports more than the parties intended. To apply it technically would make it null as to both parties, and, therefore, suicidal. Void and voidable, essentially different in object and effect, are too often used indiscriminately; and it is demonstrable that in this case "*void*" was intended to mean *voidable*, or to be treated as void by the insurer at his own exclusive option, and not an absolute nullity as to either party in all events; and, therefore, the insurer might, by contract or conduct, waive the right to exoneration and become estopped from enforcing the conventional condition of forfeiture. And the able counsel for the appellant insist that the appellee has done so, by receiving from the other two insuring companies two thirds of the loss, by co-operating in the assessment, and by refunding a portion of the premium. But this court cannot concur in this conclusion. The appellee was no party to the arrangement, whereby two thirds were accepted from the other companies, and cannot therefore be affected by any implication suggested by it as between the only parties to it.

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The assessment cannot be construed as more than a prelude to the ulterior decision, by the appellee, to pay or not to pay, on full knowledge of all the preliminary facts, when satisfactorily presented to it for its consideration. The simple assent to the appraisement could not consistently imply a waiver of forfeiture, and especially as the ground of it was not then known to the appellant. Nor can we perceive how a return of a portion of the premium, and a cancellation of the policy, could be rationally interpreted as an acknowledgment of the appellee's continuing obligation to pay for the loss. This transaction seems to import a compromise, and a renunciation of liability; and, after the acceptance of forty-one dollars, and a surrender and cancelment of the policy, we do not see how the appellant could maintain an action on it, as if still alive and undischarged. The agent who made this compromise had authority to do so, for his power was then suspended *only* as *to future risks;* but if he had no authority to act as he did, his act can furnish no evidence against his constituent of a waiver of any of its rights, but rather proves the contrary.

The uncontradicted and uncontroved facts left to the jury no fact to try, and the court had the right to announce the deduction of law, which, according to the foregoing view, it did correctly.

Wherefore, though peremptory instructions are hazardous, and often indiscreet, yet, as that given in this case was right, and did not encroach on the legal province of the jury, the judgment is affirmed.

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CASE 50—PETITION EQUITY—DECEMBER 3.

Marshall vs. Marshall.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. Infants' real estate having been sold by irregular proceedings under the provisions of chapter 86, Revised Statutes, the guardian of such infants may file additional pleadings to correct and cure the irregularities, and he may also execute the proper covenants, under the provisions of an act to enlarge the jurisdiction of the Louisville Chancery Court, approved February 26, 1868. When all defects in the original proceedings are cured, the interest of the infants being promoted thereby, the sales should be confirmed, and the motions of the purchasers to set the sales aside should be overruled, whether made before or after the passage of said enabling act; but the purchasers in this case are not required to pay interest during the time required to perfect the title to them. The act above referred to is held to be constitutional.
2. In the absence of a statutory guardian, the public guardian could take control of suits which he might find pending and not prosecuted for the want of a statutory guardian.

I. & J. CALDWELL,
BRAMLETTE & SON,
JOHN T. BUNCH, and
S. S. BUSH, For Appellant,

CITED—

Act of February 26, 1868, *to enlarge the jurisdiction of the Louisville chancery court, Sess. Acts*, 24.
1 *Duvall*, 349; *Thornton vs. McGrath.*
2 *Duvall*, 508; *Woodcock, &c., vs. Bowman.*
Revised Statutes, chap. 86.
Sugden on Vendors, p. 419, *secs.* 9 *and* 15 *to* 21.

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United States Equity Digest, 322, 506—"*Special Performance*" and "*Rescission.*"
Constitution of Kentucky, sec. 40, *art.* 4, *and sec.* 37, *art.* 2.
2 *Peters*, 380; *Satterlee vs. Matthewson.*
8 *Peters*, 88; *Watson vs. Mercer.*
3 *McLean*, 212; *Milne vs. Huber.*
2 *Peters*, 413; 11 *Peters*, 420, 439.
1 *Bush*, 637; *Pettit's adm'r, &c., vs. Johnson.*

W. R. THOMPSON, For Appellee,

CITED—

Act of February 26, 1868, *Sess. Acts, p.* 24.
Revised Statutes, chap. 86; *also, Myers' Sup.*, 368.
Constitution of Kentucky, sec. 32, *art.* 2.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This was a decretal sale of real estate at Louisville which descended from John Marshall, deceased, to his children and heirs-at-law, some of whom were minors.

The proceedings were irregular in not complying with the requisites of chapter 86 of our Revised Statutes.

Subsequently to the sale, and prior to the enactment of the enabling statute of February 26, 1868, some of the purchasers entered their several motions to vacate the sale, because of such irregularities, and some entered their motion subsequently.

After said enactment, Crawford, who appeared as guardian for the minor heirs, filed additional pleadings, seeking to correct and cure the irregularities, offering to execute the proper covenants, and resisting the vacating the sales, *to all of which the purchasers objected.*

The cause was referred to a commissioner, who made an additional report, and the evidence clearly establishes

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the fact, that it was to the interest of the minor ward and heirs to have the land sold, and that it is greatly to their interest to sustain the sales made, rather than to have a resale; and one witness, who says he is familiar with the property and condition of the heirs, thinks a resale would injure them at least ten thousand dollars.

Crawford, as guardian, executed the proper covenants, and the proceedings are now regular, all defects in the original proceedings being cured by the subsequent ones. The court set aside the sales so far as the purchasers had entered their motions previous to said enactment, but overruled those which were subsequently made. This must have been done for the reason, as urged by the appellee's counsel, that said enactment was unconstitutional as to those who then had motions pending at its date.

This enactment was not an attempt by special legislation to sell infants' real estate, but was a statute of general import to authorize the perfecting of irregular proceedings, which were intended to comply with the general statute, but, from inadvertence or other cause, did not; therefore it is not in conflict with section 32, article 2, State Constitution.

The purchasers had acquired no vested right to have the sale set aside, notwithstanding the title could be made perfect to them; and as a good legal title was what they supposed had been purchased, and was all that they did or had the right to expect, if this could, within a reasonable time, be secured to them, no wrong or injustice would be done. As, however, they should be secured a perfect title before the purchase money should be coerced out of them, and a reasonable time to perfect the title allowed, the purchasers should not be compelled to pay interest in the meantime.

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As we think their title under these proceedings will be perfect on a return of the cause, they should be compelled, at once, to pay the purchase price without interest, however, after their bonds were due, and to accept proper deeds, to be made under the supervision of the court.

Crawford appears in the case as statutory guardian, and has executed the necessary bonds. It is said that he is but a public guardian; of this, however, we find no evidence in the record; but even if this were so, we suppose, in the absence of a statutory guardian, the public guardian could take control of suits which he might find pending and not being prosecuted for the want of a statutory guardian. These proceedings were originally begun by statutory guardians; but it may be presumed that they have either died, or ceased to act from some other cause, as no one of them appears in the record to contest Crawford's right to control and manage the case.

Wherefore, the judgment vacating the sale is reversed as to those purchasers seeking and obtaining it, and affirmed as to such whose motion to vacate the sale was overruled, with directions for further proceedings as now indicated.

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CASE 51—PETITION—DECEMBER 3.

Samuels, &c., vs. Trustees of Poplar Plains.

APPEAL FROM FLEMING CIRCUIT COURT.

The trustees of Poplar Plains being invested with title to a school-house and lot in said town, under an act of February 23, 1860, sold the same, and, in pursuance of the popular will of the citizens of the town, as expressed in a public meeting, reinvested the proceeds of the sale as so much stock in a seminary lot and buildings just outside of the corporation. *As the act did not require the reinvestment within the corporation, the trustees cannot be held responsible as for a misapplication of the fund.* The town cannot abandon its stock in the seminary and look to the trustees for the amount.

E. C. PHISTER and
WM. S. BOTTS, For Appellants,

CITED—

Scss. Acts, 1859–60, *vol.* 2, *pp.* 400, 401.
9 *B. Mon.*, 338–9; *Chcancy vs. Hooscr.*
18 *B. Mon.*, 711; *Morgan vs. Dudley.*
1 *Parsons on Contracts*, *p.* 66.
Story on Agency, *scc.* 302.
2 *Kent's Com.*, *scc.* 41, *p.* 633.
3 *Brod. & Bing.*, 275.
1 *Met.*, 77–8; *Murry, &c., vs. Carothers, &c.*

W. H. WADSWORTH and
WM. O. PHILLIPS, For Appellees.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

By an act of February 28, 1860, the Legislature authorized the trustees of the town of Poplar Plains to sell a lot

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and school-house therein, the title to which was in said trustees, and to invest "the proceeds of sale in the purchase of other grounds and the erection of other school-house buildings." By authority of this statute and pursuant to the popular will of the tax-payers of the town, almost unanimously given at a public meeting, the trustees did sell said lot and house for seven hundred and ten dollars, and invested it, in common with some two thousand dollars raised by subscription of the citizens, in the purchase of an eligible lot just outside of the corporate limits of the town, and the erection thereon of a suitable house and building for seminary purposes.

This seems to have been a good educational institution, not only for the academy proper, but in which also was taught a common school in one of its apartments, under the supervision of the principal of the academy, until August 28, 1867, when a rather formal protocol correspondence began between the trustees of the common school for that district and the trustees for the seminary, which seems to have been conducted with all the formality and sensitiveness of regular diplomacy, and which resulted finally in a general misunderstanding, and bellicose proceedings to hold the original trustees responsible for the misappropriation of the proceeds of the sale.

This lot and house so sold never belonged to the common school commissioners, nor the common school trustees of the district, but seems to have belonged to the town, not as a common, but in which a pay or subscription school had been taught. The act authorizing its sale and the reinvestment in other school buildings was, therefore, no violation of any dedication or trusts attached to it. Nor is there anything in this enactment which requires the reinvestment to be within the corporate limits of the town; and, as matter of economy and care for

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the pupils and their advancement, it may have been proper to purchase without the town limits; and that such was the case is indicated by the evidence. And although it may be inferred that the new buildings and ground upon which they are erected are owned by a corporation consisting of stockholders, yet, if such be the case, the town still holds the amount of its investment therein.

After the procuring said enactment and ascertaining the popular will of the tax-payers of the town, and making the sale and reinvestment pursuant to these, and when it has been for several years peaceably acquiesced in, it would seem both hard and unjust to hold the trustees personally liable for the proceeds of the sale, ignoring the investment thereof; and before such could be done, it should clearly appear that they have violated some law, trusts, or vested interest.

It may be that, by proper enactment and proceedings, the town could sell its stock in the seminary; but it cannot now be permitted to abandon this and look to the trustees for the amount so invested at the instance of the citizens and beneficiaries.

Wherefore, the judgment is reversed, with directions to dismiss the petition.

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CASE 52- PETITION EQUITY—DECEMBER 4.

John H. Barret & Co. vs. City of Henderson

City of Henderson vs. John H. Barret.

APPEALS FROM HENDERSON CIRCUIT COURT.

1. When a city is authorized "*to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the State,*" such tax must be levied as of the date, and upon the same persons and property as prescribed by the revenue laws of the State. "*Tax payers of the city, taxable under the revenue laws of the State,*" designates both the person and subject of taxation.
2. TAXATION—EQUALIZATION CLAUSE.—It is the duty of the assessor to assess and list under this clause *all money, choses in action, deposits, &c.,* whether within or without this State, unless taxed by the country where situated, and also to assess and list *all tobacco, grain, and crops of past years then on hand,* and *all the growing crops, articles manufactured in the family, poultry raised, and provisions, &c., on hand,* so far as the same *may not be for family use.* From the amount of all these the assessor is required to deduct the amount of the indebtedness of the party being assessed, and also the sum of one hundred dollars. This assessment is required to be made as of the 10th day of January each year, except merchants and grocers, who are required to list their stocks as of April 10th each year. (*Revised Statutes,* 2 *Stanton,* 253-4, *and sec.* 15, *chap.* 83.)
3. Stemmers of tobacco are required by law to list all tobacco on hand on the 20th day of January each year; but they are not liable to assessment as merchants as of April 10th each year.

S. B. VANCE, and
M. C. JOHNSON,
For John H. Barret & Co. and John H. Barret,

CITED—

Act of Jan. 29, 1867, *Scs. Acts, vol.* 1, *pages* 146, 153.
Act of March 9, 1867, *Ses. Acts, vol.* 2, *page* 553.
2 *Met.*, 355; *Cypress Pond D. Co. vs. Hooper.*

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14 *B. Mon.*, 661; *Johnson vs. City of Lexington.*
1 *Kent*, 463; *Rutherford*, 416.
Revised Statutes, chap. 83.
Act of Jan. 31, 1814, 2 *M. & B.*, 1371.
Act of Feb. 31, 1833, 2 *M. & B.*, 1388.
Act of Feb. 29, 1836, *Loughborough*, 509.
Act of Jan. 4, 1840, *Loughborough*, 514.
Act of 1845, *sec.* 2, *page* 81.
2 *B. Mon.*, 140; *Collins vs. City of Louisville.*
Acts of 1835–6, *page* 287.
Act of Congress June 30, 1864, "*An act to increase duties on imports,*" *&c.*
Act of Congress July 1, 1862, "*An act to provide internal revenue,*" *&c., secs.* 87 *to* 92.
4 *Jacobs' Law Dic.*, "*Merchant.*"
3 *Mon.*, 335; *Landsdale vs. Brashear.*
6 *J. J. M.*, 543–4; *Dyott vs. Letcher & McKee.*
Act of 1792, *Littell's Laws, page* 64.
1 *Met.*, 624; *Overfield vs. Sutton;* 24 *Wendell*, 47.
9 *B. Mon.*, 35; *Cheaney vs. Hooser.*
15 *B. Mon.*, 498; *City of Covington vs. Southgate.*

JOHN W. CROCKETT,
TURNER & TRAFTON, and
STEVENSON & MYERS, For City of Henderson,

CITED—

Sess. Acts, 1867, *vol.* –, *pages* 147, 323, 347; *vol.* 2, 330, 553; 1853–4, *vol.* 1, *page* 375.
Rev. Stat., 2 *Stanton*, 248, 253–4; 1 *Stanton*, 262.
8 *B. Mon.*, 1; *Commonwealth vs. Hays.*
7 *Dana*, 343; *Johnson vs. Commonwealth.*
14 *B. Mon.*, 648; *Johnson vs. City of Lexington.*
2 *Met.*, 227; *City of Covington vs. Powell.*
1 *Bush*, 381; *City of Louisville vs. Henning & Speed.*

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Bouvier's Law Dic., "*Estate*," "*Personal Property*."
Mass. Revision, page 75, "*Personal Estate*."
14 *B. Mon.*, 266; *Nazareth L. & B. Institution vs. Commonwealth.*
Acts 1851–2, *page* 588; 1850–51, *vol.* 2, *pages* 51, 386.
2 *Bush*, 596; *Trigg vs. Glasgow.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The city of Henderson, having subscribed for stock in the Evansville, Henderson, and Nashville Railroad Company, under the act of incorporation, levied a tax to pay the interest on bonds issued to pay for it. The authority is "*to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the State, a sum sufficient to pay the interest and the costs of collecting the same.*"

Barret & Co. were largely purchasing leaf tobacco from the planters of Henderson and surrounding counties, and were stemming and shipping it to foreign markets for sale. The city insists upon the right to tax this tobacco as merchandise, subject to taxation under the general revenue laws of the State.

The act of January 9, 1852 (2 *Stant. Rev. Stat.*, 253–4), amending the revenue laws, directs the assessor in each county, after taking the list of all property required to be specifically listed, "to require each person, on oath, to fix the amount he or she *is worth from all other sources on the day to which said list relates*, after taking out his or her indebtedness from said amount he or she is worth, exclusive of property in lands, slaves, or other property not within this Commonwealth, *but subject to taxation by the laws of the country where situated;* and the said assessors shall take from the said amount so assessed and listed the sum of one hundred dollars, and set down and list the balance for taxation: * * * *Provided*, That the

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growing crop on land listed for taxation, articles manufactured in the family for family use, all the poultry raised for family use, and *the provisions on hand for family use*, shall be exempt from taxation."

The value and amount of property is to be listed as of January 10th of each year, and the value from all other sources is to be given in as of that date, except as to merchants and grocers, who are to list their stocks as of April 10th, in each year.

Such crop, therefore, as may be *growing* on the land January 10, the *articles manufactured* in the family, *the poultry raised*, and the *provisions on hand*, so far as all *these may be for family use*, are exempted from taxation, and only so far. The ripened crop of the past season, so far as not needed for family consumption, is to enter into the value of the estate from other resources than the specifically taxed articles; so of all the other products of the farm, whether of cereals or meats.

As the Legislature has manifested an intention to tax the surplus products of the country under this designation, *of from all other sources*, it is hardly probable it was intended to tax it as merchandise as of April 10, in each year, as thereby a double taxation would be placed upon the same crop. Whether, therefore, dealers in tobacco and other products might not, in the absence of any contrary intent appearing, be deemed merchants within the meaning of section 15, chapter 83, Revised Statutes; and if so, whether the adding labor to it, and thereby placing it in an altered or new condition, might not exempt it from the exclusion of said section as "articles manufactured in families within this State," is not important, especially as we regard the intent to tax it as of January 10, in each year, under the provisions of the subsequent enactment of January 9, 1852, as much more apparent;

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and if there be any inconsistency, the latter act must prevail.

It was then erroneous to assess Barret's tobacco as of any other date than that of January 10th; but he, like all other owners, should give in all the tobacco then owned, as part of his estate, from all other sources not specifically taxed.

This liability of the city did not occur until after April; hence, the council determined to make the assessment as of June, and perhaps this would produce as much equality as any other time; yet, as the whole manner of taxation, the persons and property to be taxed, are to be regulated by the State revenue laws, and no other day being designated in the special enactment, the dates fixed by the general revenue laws must govern even for the first year, and certainly so for the succeeding years; and, on a return of the cause, the assessment will be directed as of the different dates designated by the general revenue laws for the various assessments to be levied.

The city sought to assess John H. Barret on a large amount of funds in other cities and countries under the equalization rule, but which the court below refused to allow.

It is insisted by him that the language of these special enactments does not authorize this; that "*tax-payers of the city, taxable under the revenue laws of the State*," designate the persons but not the subject of taxation; but we think it manifest that the Legislature intended thereby to include the entire subject, embracing the persons, the property, and manner of the assessment, and to adopt in relation to all of these. the revenue rule of the State.

By said act of January 9, 1852, it is made the duty of each person, "on oath, to fix the amount he or she is worth from all sources, on the day to which said list re-

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lates, after taking out his indebtedness from said amount he or she is worth, *exclusive of property in lands, slaves, or other property not within this Commonwealth, but subject to taxation by the laws of the country where situated.*"

This statute has heretofore been under revision by this court, and has been held to embrace money, choses in action, deposits, &c., in other countries as subject to assessment, unless taxed by the country where situated.

The only limitation upon the taxing power is, that it shall be equal, when all who own money within or without the State are required to list it for taxation, unless, when in other States and countries, it is there taxed, equality is secured.

This act, therefore, we regard as both constitutional and applicable to this case; and in the absence of any evidence that Barret's money is taxed where situated, it is liable to the assessment for railroad purposes just as it would be for State revenue.

The judgment refusing the assessment as to Barret's funds in other countries was, therefore, erroneous.

Wherefore, the judgment against John H. Barret & Co., in favor of the city, and the judgment against the city of Henderson, in favor of John H. Barret, are both reversed, with directions for further proceedings consistent herewith.

As there were errors as to both parties, no judgment for costs will be allowed to either.

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CASE 53—PETITION ORDINARY—DECEMBER 4.

Calhoun vs. Atchison, &c.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. A contract made by telegrams is binding on the parties.
2. In the lease of a plantation in Mississippi by parties in Louisville, Kentucky, by telegrams, nothing being said as to the time at which the rental was to be paid for the year 1866, the time of payment of rental is determined and fixed by the laws and customs of Mississippi. By these laws and customs, as proven in this case, the rental is required to be paid at the beginning of the yearly lease, unless expressly covenanted otherwise.
3. The landlord having leased his land, the lessees failing to cultivate the same, the landlord cultivated a portion thereof. The lessees are entitled to a credit for the *pro rata* value of that portion which was cultivated by the landlord.

BRUCE & RUSSELL, For Appellant,

CITED—

1 *Parson's on Contracts*, 399, 401.
2 *Kent's Com.*, 640–41.
7 *Dana*, 281; *Chiles vs. Nelson.*
3 *Met.*, 557; *Cook vs. Brandeis & Crawford.*
American Law Register for 1868, *p.* 215.

O. F. STIRMAN, and
WARD & SON, For Appellees,

CITED—

Parson's on Contracts, *4th ed.*, *p.* 399.
1 *Sumner*, 218; *Hazard vs. New England Marine Ins. Company*; 3 *Johnson* 543; *Bruce vs. Pearson.*
2 *Woodbury & Minot*, 359; *Greene vs. Bateman.*
7 *Johnson*, 470; *Tuttle vs. Love.*

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4 *Wheaton*, 225; *Elcason vs. Henshaw.*
5 *Mus. & Welby*, 535; 1 *Kern.*, 441.
4 *Mus. & Welby*, 155; 1 *Price*, 70.
2 *Ves. & Bea.*, 345; *Stratford vs. Bosworth.*
3 *Met.*, 80; *Hutcheson vs. Blakeman.*
Story on Contracts, *sec.* 392,
2 *Met.*, 311; *Morly vs. Moxly.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The main and important question in this case, and which must control, is, whether there was an agreement between appellant and appellees as to the lease, for the year of 1866, of appellant's farm in the State of Mississippi, known as Glen Allen, consisting of about nine hundred and twenty-five acres of cleared land, with dwelling and other necessary houses, and four hundred acres of out land.

January 24, 1866, appellee, Carr, addressed Dr. Ned Blackburn, appellant's son-in-law, a letter, on board the steamer Virginia, off Grand Lake, which was delivered to appellant at Natchez, Mississippi, in which he says he went to Natchez, where he saw Dr. Calhoun: "My object was to try to lease the Glen Allen plantation. I obtained from the Doctor a proposition, as follows: nine hundred and twenty-five acres at fifteen dollars per acre, thirteen thousand three hundred and seventy-five dollars; cotton seed used in planting, fifteen hundred dollars—fourteen thousand eight hundred and seventy-five dollars. If I advance or use fourteen thousand eight hundred and seventy-five dollars in stocking, the Doctor proposes to advance equally with me the rest of the amount necessary to carry on the plantation, and, at the *termination of the year* 1866, to divide equally every thing that has been purchased for the plantation

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and the crop. I represent Colonel Atchison, of Louisville, who is to be equally interested with me. I do not think the above terms will suit him. I wish you to write to me at once and *tell me if the plantation can be leased for a money rent; and if so, the price per acre of ground cultivated or susceptible of cultivation. Please give me two proposals—share of crop and cash rent—the best terms you can give in either case;*" and wound up by requesting an address "Lock box No. 12, Louisville, Kentucky."

January 31, 1866, Calhoun sent to Carr's address, as requested, the following telegram: "*You can lease Glen Allen for ten thousand dollars—nine hundred and twenty-five acres cleared.* Answer immediately."

February 5, 1866, Atchison sent from Louisville, Kentucky, the following telegram, addressed to Calhoun, Natchez, Mississippi, which was received the next day: "*Satisfactory; will take Glen Allen, with what is needed, at once—answer H. M. Carr.*"

February 7, 1866, Calhoun sent from Natchez the following telegram, addressed to Carr, Louisville: "*Telegraph me when Col. Carr will meet me at Glen Allen.*"

February 5, 1866, dated 3d by mistake, Carr addressed from Louisville, Calhoun at Natchez, by letter, through the mail, in which he says: "Your dispatch reached me, and *I answered, saying that we would take the place.* I did not receive the dispatch until yesterday, and had to take one day to talk with Col. Atchison and Mr. Morgan, both of whom will be associated with me. *Please write us at once and tell us all that will be required in the way of stock, number of hands, number of ploughs, and kind of planters, if any, and all that we need.*"

February 8, 1866, Calhoun, from Natchez, addressed Carr, at Louisville, by letter, in which he says: "I was yesterday in receipt of Col. S. Atchison's telegram, dated

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Louisville, 5th of February, *informing me that my offer to lease Glen Allen the present year had been accepted.* I immediately replied by telegram to be informed at what time I might expect you at Glen Allen, that I might be there to meet you."

He then goes on to specify what stock, tools, &c., they will want to carry on the farm, and what he can let them have, if they should desire it.

By letter from Louisville, of same date, February 8, 1866, Carr, Atchison, and Morgan jointly addressed Calhoun at Natchez, in which they say: "Your letter of February 1st, in answer to mine to Dr. Ned Blackburn, I received this morning, and have shown it to Col. Atchison. We telegraphed you in answer to your dispatch, *accepting your proposal of lease of Glen Allen at ten thousand dollars, for the year* 1866. We also have written twice to you, but not by express. This I will send per express. We are a little uneasy on account of not having received any reply from you to our dispatch. *We are getting ready as fast as possible. Mules are awful high and hands hard to get; but we will be down as soon as we possibly can get ready. We want you to write as soon as you can, giving a detail of every article, from largest to smallest, needed to work the place.*"

This correspondence manifests, in the clearest and most explicit terms, that appellant had proposed to lease his Glen Allen farm in Mississippi for the year 1866 at ten thousand dollars, which had been unconditionally accepted by appellees. They regarded the contract as closed; therefore, commenced getting up the stock and hands with which to cultivate the farm. All the lessees had been disclosed to the lessor.

As was held by the appellate court of New York in *Beach vs. Raritan and Delaware Bay Railroad Company* (37

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N. Y. Rep., 457), telegrams by which parties transact their business stand on the same footing as letters written; hence, the telegram of Calhoun to Carr, of January 31, saying you can lease Glen Allen for ten thousand dollars, and the response thereto of February 5, accepting the proposition, by saying "*satisfactory; will take Glen Allen*," taken in connection with the previous letter proposing to lease it for the year 1866, shows a specific proposition made by the one party and accepted by the other, and contains all the essential elements of a contract. The written correspondence sent through the mails and by express rehearse and reaffirm the telegraphic correspondence, and thereby makes it a part of itself.

The correspondence at this point makes an agreement to pay ten thousand dollars for the use of Glen Allen for the year 1866; but whether to be paid at the beginning or termination of the lease is not specified, save that by the words "*money*" and "*cash rent*," used in said correspondence, it may be inferred that one party expected to receive the rent in advance, and the other expected to so pay it; but if this were not so, the time of payment must be determined by the laws and customs of the country where the farm is situate, where the contract is to be performed, and where the landlord lived, and where, in legal contemplation, the contract was made. The proof shows this is then to be paid at the beginning of the lease, unless expressly covenanted otherwise.

The next correspondence is the following telegram of Carr, from Louisville, to Calhoun at Natchez, of February 13, 1868: "*Can you wait until crop is raised for the rent?* Will telegraph you where we meet."

This, of itself, manifests that the appellees understood that the rent was to be paid in advance; for, if to be

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paid at the end of the year, why inquire of the landlord whether *he could wait until the crop was raised?* If such was their understanding of the contract, the inquiry was entirely idle, as nothing had been said up to this time by either in relation to altering the terms.

But this is made the more imposing by the letter of Carr to Calhoun of the next day, in which he says: "*Last night, myself and Mr. Morgan called on Col. Atchison with our share of the money to run your place, and asked him to sign the agreement and put in his share. He, for many foolish reasons, refused to do so. We have all along depended on him for one third of the capital. It has left us in a situation so that we cannot go on. It leaves me in a ridiculous, foolish, and dishonorable fix.* As the best amends, I write by express, and telegraph you; Mr. Morgan starts down the river to-morrow, and will probably see you. *It is so late now we cannot get another man in time. We were prepared with two thirds, and were getting hands and mules.* If there was any way of avoiding this, it would be done. *I have been using every endeavor to get another capitalist, but cannot so far.* I never will attempt another move on the promises of men. I would write more, but I cannot. *I fear all has failed.*"

Even in this, after Atchison had failed to furnish his third of the means, Carr makes no pretext that no contract of leasing had been made, but, on the contrary, recognizes such, and seems fully to feel the very embarrassing condition of the appellees, and complains that he is left in a "*ridiculous, foolish, and dishonorable fix,*" which could not possibly be if no agreement had been entered into. It was because of a contract, and its non-fulfillment, that so embarrassed him; this, moreover, shows that the pretext in his oral evidence, that appellees understood the rent was to be paid at the maturity of the

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crop, else they would not have leased the premises, was but an after-thought, and cannot overturn the contract as manifested by this correspondence. Beside, it could at best only affect the question of damages as to interest alone; for had the parties signed an instrument of lease, without saying when the rent was to be paid, this could not have affected the validity of the contract, but as to damages, would be settled according to the laws and customs of the place, in the absence of an express agreement.

The subsequent correspondence between the parties, nor their attempted subsequent but incomplete contract to cultivate the farm by Carr, Morgan, and Calhoun, neither waives nor alters this closed contract of a leasing of Glen Allen for the year 1866 at ten thousand dollars. But as Calhoun did have a portion of the farm cultivated, he has no right to recover as to it; a *pro rata* deduction should be made therefor. The evidence introduced by him, that such cultivation proved disastrous, and did not quit expenses, was irrelevant, as would have been evidence of large profits. The agriculturist, like those of all other pursuits, must take the hazard of profit and loss; and the one cannot enhance, as the other cannot lessen, the measure of rents, as it must be fixed before the crop is made; and on a return of the case this evidence should be rejected.

Indeed, as the written correspondence manifests an obligatory contract, the issue will be narrowed to an inquiry as to damages, the measure thereof being the leased price, with interest thereon from time it should be paid, subject to a *pro rata* deduction for that part of the farm cultivated by Calhoun. As Carr confesses in his answer the writing said letters and sending the telegrams, these are to go as confessed against him;

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but as both Morgan and Atchison have substantially plead *non est factum* as to these, there is an issue thereon to be ascertained by the evidence, and which Carr in his testimony fully established in appellant's favor. The written correspondence, including the telegraphic, abundantly indicates Calhoun's readiness and desire to deliver to appellees Glen Allen.

Wherefore, the judgment is reversed, with directions for a new trial and further proceedings consistent herewith, the instructions being wholly inconsistent with this view of the case.

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CASE 54—PETITION EQUITY—DECEMBER 4.

Carlisle, &c., vs. Chambers.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. Promissory notes made negotiable and payable at a bank in the State of Ohio, by the laws of that State, have the legal character of bills of exchange.
2. Promissory notes made negotiable and payable at a bank in Kentucky, if negotiated by a bank chartered by Kentucky, have the legal character of bills of exchange; but if not so negotiated, they are simple promissory notes only.
3. When the law of the place of payment (*lex loci solutionis*) makes negotiable notes bills of exchange, the universal law of comity requires their recognition as such between the original parties.
4. A negotiable note, being a bill of exchange in the State where it is made and executed, being indorsed in another State where it is by law a simple promissory note, by one citizen to another citizen of such State, such indorsement implied only an assignment of a simple promissory note. The citizens of the latter State should be presumed to have ascribed to the note the character stamped on it by their local law.

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5. A promissory note made negotiable and payable at a bank in Ohio, passed in that State to a citizen of Kentucky, who afterwards, in Kentucky, indorsed it to another citizen thereof. This note was not negotiated in a Kentucky bank. The indorsement was made, intended, and treated as an assignment of the note. The indorser is responsible only as assignor of the note, and not as an indorser of a bill of exchange. The law of Kentucky regulates the distinct contract of indorsement and the liability of the indorser.
6. As to all who became parties to such bills in Ohio, knowledge of the law of that State will be presumed. Any presumption that the parties understood the true character of the thing contracted about, may be repelled by extraneous proof that they understood it to be a promissory note, the indorsement of which they expected to operate as an assignment.
7. The assignor of a note executed to his assignee a mortgage *providing that said assignor and the obligors in said note shall cause the same to be paid at maturity, &c.* This mortgage is not a constructive guarantee of payment upon the part of the mortgagor alone; but a security, that if the assignee should, after proceeding with due diligence, fail to obtain payment from the obligors in the note, the mortgage would assure full payment by the mortgagor on his ultimate liability as assignor.

MENZIES & FURBER,
JOSHUA F. BULLITT, and
CARLISLE & O'HARA, For Appellants,

CITED—

Story on Conflict of Laws, secs. 267, 314, 315.
12 *Wendell*, 439; *Aymer vs. Sheldon.*
6 *Carr & Payne*, 25.
3 *Mass.*, 77; *Powers vs. Lynch.*
13 *Mass.*, 20; *Prentiss vs. Savage.*
6 *Cranch*, 221; *Slocum vs. Pomeroy.*
20 *Martin*, 1; *Depau vs. Humphreys.*
12 *Johns.*, 142; *Hicks vs. Brown.*
1 *Met.* (*Mass.*), 82; *Williams vs. Wade.*
3 *Kent's Com., sec.* 39, *p.* 459.
Smith's Mer. Law, 271.

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1 *Parsons on Contracts*, 230–240.
Chitty on Bills, 253.
7 *B. Mon.*, 575; *Goddin vs. Shipley.*
14 *B. Mon.*, 556; *Young vs. Harris.*
Bayley on Bills, *p.* 28.
3 *Kent's Com.*, 116–120.
1 *Bing., New Cases*, 151; *Trimbey vs. Vigney.*
1 *Barn. & Adolph.*, 284; *De L. Vega vs. Vianna.*
10 *Barn. & Cress.*, 903; *British Linen Company vs. Drummond.*
8 *Peters*, 361, 372; *Bank of U. S. vs. Donnelly.*
13 *Peters*, 378; *Wilcoc vs. Hunt.*
4 *Met.*, 330; *Ransdall vs. Shropshire.*
1 *Duvall*, 30; *Quisenberry vs. Artis.*

PRYOR & CHAMBERS, For Appellee,

CITED—

2 *Met.*, 123; *Spencer vs. Biggs.*
7 *Mon.*, 575; *Goddin vs. Shipley.*
17 *B. Mon.*, 660; *Piner vs. Clary.*
4 *Met.*, 299; *Short vs. Trabue.*
8 *Blackford*, 41; *Shanklin vs Cooper.*
3 *Dana.*, 126; *Triplet vs. Hunt.*
3 *Kent's Com.*, *s. p.* 107.
1 *Duvall*, 325; *Harmon vs. Wilson, Hicks, &c.*
3 *Met.*, 285; *Muhling vs. Sattler.*
Myers' Supplement, *p.* 741, 355.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In the State of Ohio, on the 20th of March, 1865, W. A. Parsons executed and delivered a note or bill, promising to pay to B. P. Hinman or order two thousand seven hundred and sixty-seven dollars and eighty-five cents, eighteen months after date, at the Commercial Bank of Cincinnati; and on the same day J. W. Holin-

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shade executed a similar document for the same amount, payable at the same time, to his own order, at the Third National Bank in Cincinnati.

Each of these documents having been indorsed and delivered in Cincinnati to J. G. Carlisle, of Covington, he afterwards, for value and not mere accommodation, indorsed them, in Covington, Kentucky, to Jos. Chambers of that city, and *three months afterwards* executed a mortgage on three tracts of land to secure his liability as indorser.

It is agreed, that, by the law of Ohio, each of those papers had the legal character and effect of a bill of exchange; while, if made payable in Kentucky, there having been no negotiation of the bills in any bank chartered by Kentucky, they would have been simple promissory notes only. Chambers, treating them as bills of exchange, proceeded, by regular protest and notice, as in cases of such bills, according to the law of Kentucky, to make Carlisle responsible at once, without any previous action against the drawers, which would have been indispensable if his indorsements were assignments of promissory notes; and it appears probable, that, had he diligently prosecuted such suits, he might have made thereby the whole amount, and that now each drawer is insolvent.

Carlisle, insisting that his indorsements in Kentucky of what, if payable here, would not have been commercial paper, were only assignments of notes, which, according to her law, did not make him responsible unless the obligors had been diligently prosecuted to insolvency, therefore claimed exoneration; and, consequently, this suit in equity was brought for obtaining personal judgments against him and enforcing payment by a sale of the mortgaged property.

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The circuit court, adjudging that the notes were bills of exchange and indorsed as such, gave judgment for the principal and interest of each bill, and decreed a sale of two of the tracts mortgaged. Carlisle appeals from that decree; and Menzies and Scott, made parties as claimants of those two tracts by sub-purchase, also appeal.

As payment was to be made in Ohio, the *lex loci solutionis* fixed the character of the documents indorsed by Carlisle to Chambers; and, as that law made them bills of exchange, an universal law of comity requires their recognition as such between the original parties to them.

The law of Kentucky undoubtedly regulates the distinct contract of indorsement and the liability of the indorser. It fixes the character and extent of the liability implied by the indorsement, the protest, notice, and damages; but it does not determine or change the legal quality or character of the thing indorsed. If, by the law which controls its obligation and defines its character, it is a bill of exchange, the indorsement is not presumptively *per se* an assignment of a promissory note, and the law regulating the liability of assignors does not necessarily apply to it; but any presumption that the parties understood the true character of the thing contracted about may be repelled by extraneous proof that they understood it to be a promissory note, the indorsement of which they expected to operate as an assignment.

As to all who became parties to the bills in Ohio, we must presume knowledge of the law of that State; and, consequently, that they knew that these documents operated as bills of exchange, and so this court adjudged in *Goddin vs. Shipley*, 7 *B. Mon.*, 575; *Young vs. Harris*, 14 *Ib.*, 558; and *Short vs. Trabue, &c.*, 4 *Met.*, 299.

But, on the question, what presumption arises on an indorsement of such a bill in a foreign State, whose law

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treats it as only a promissory note, and where both indorser and indorsee reside, none of those cases shed any judicial light. One of them expresses doubt, and another indicates, by clear intimation, that, in such a case, the *prima facie* presumption would be that the parties to the indorsement considered the paper as a simple promissory note, and negotiated it as such, and not as a bill of exchange.

It was decided, however, in England, in the case of *Rothchild vs. Curry* (1 *Ad. & El. N. S.*, 43), that an indorsement is a new bill, payable where the indorsed bill was made payable, and governed by the law of that place; and *Shanklin vs. Cooper* (*8th Blackford's Indiana Reports*) followed that decision. But the reason assigned for these adjudications was false and indefensible, and has been properly repudiated by this court in *Short vs. Trabue, supra;* and the same Indiana court, in the case of *Hunt vs. Standardt* (15 *Indiana Reports*, 15), overruled *Shanklin vs. Cooper*, and decided that the indorsement by one citizen of Indiana to another citizen of that State, made therein, of a note executed and payable in New York, where it was a bill of exchange, implied only an assignment of a simple promissory note, which was not commercial paper by the law of Indiana. The ground of this decision is, that the citizens of Indiana, not presumed to know the peculiar law of New York, should be presumed to have ascribed to the note the character stamped on it by their own local law, with which they were presumed to be acquainted; and, without any other evidence indicating the understanding of the parties to the indorsement, we would concur with that court in the application of right reasons to the facts of that case. The facts of this case are, however, in some respects, different from those in that case.

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When the bills were indorsed to Carlisle, in Cincinnati, he took them according to the law of Ohio, which, as he contracted under that law, he must be presumed to have then known; and his indorsee was a citizen of Kentucky in sight of Ohio, and therefore had peculiar means of knowing the character of the bills by the law of Ohio.

These extraneous circumstances neutralize the presumption which might otherwise arise from the place of indorsement and the domicils of the parties to it, as in the case of *Hunt vs. Standardt*, and leave the contract of indorsement without any preponderating presumption of the understanding of the parties as to the character of the things indorsed, and the legal effect of the indorsements.

For the solution of this perplexity we must, therefore, look to other extrinsic circumstances; and we find the following:

1. The mortgage describes the bills as mere promissory notes, and does not call them bills of exchange or characterize them as such. This is a significant fact, apparently indicating that the parties treated them as promissory notes, as by the law of Kentucky they would have been if they had been payable here

2. The petition does not call them bills of exchange, but calls them notes. The answers charge, in effect, that they were negotiated between indorser and indorsee, in the character by which the law of Kentucky alone would define them; and, although three amended petitions were *afterwards* filed, yet neither of them intimates that they were indorsed as bills of exchange.

From these considerations, in the absence of any other countervailing fact than what has been stated, the judicial conclusion is, as we think, that, when indorsed in Kentucky, the parties looked to the law of their own State for the character of the notes, and considered the

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indorsements of them as assignments governed by that law as to the duties of the assignee and the legal liability of the assignor.

Thus, considering the intent and attitude of the parties, the failure to sue the obligors exonerated the assignor; and, in this phase of the case, the judgment *in personam* against Carlisle is erroneous.

But, nevertheless, the appellee's counsel insist that the decree for sale under the mortgage is right, because, as they argue, the mortgage constructively waived any suit against the obligor, and guaranteed payment by them whenever the notes became due.

The following is a copy of the condition of the mortgage: "Provided always, that if the said J. G. Carlisle, B. P. Hinman, W. A. Parsons, and J. W. Holinshade, shall cause to be paid unto the said Joseph Chambers *two promissory notes* for two thousand seven hundred and sixty-seven dollars and eighty-five cents each, dated March 20, 1865, and due in eighteen months from date, with interest from date, one of which *notes* being made by W. A. Parsons, and indorsed by said Hinman and said Carlisle, and the other being made by said Holinshade to his order, and indorsed by him and by said Carlisle, then these presents shall be void."

This condition, interpreted literally, would impose *jointly*, on all the persons named, the duty of paying or causing to be paid both notes, with interest from their date, *and as soon as they became due, and without any suit or personal demand of the obligor*. Such a construction, imposing on Carlisle as assignor such onerous and unusual duty, and so far beyond his legal responsibility, would be too absurd to be countenanced, and especially as this contract was not consummated by Mr. Carlisle's relinquishment until nearly four months after Carlisle's

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conditional liability, much more circumscribed, had been irrevocably fixed.

Construing the condition, as we should do, by the occasion, the subject-matter, and only presumable object, it means that Carlisle, contingently responsible ultimately as assignor, made the mortgage for securing his own legal liability, and not intending to take the whole burden from the antecedent parties, nor to dispense with all demand from them by suit or otherwise, only intended and virtually stipulated that, all being successively liable in their legal order, if his assignee should make, in due time, personal demand of the obligors, and should, if they failed to pay, diligently try to coerce payment by suit, and should still fail (against which failures he meant to guarantee), then he would himself pay.

In other words, the condition was not intended to increase Carlisle's liability; but, fairly and consistently construed, intended that, if the assignee should, after proceeding according to law, fail to obtain payment, the mortgage would assure full payment by Carlisle.

We therefore conclude that the court also erred in decreeing an enforcement of the mortgage.

Wherefore, the entire judgment of the circuit court is reversed, and the cause remanded, with instructions to dismiss the appellee's petition.

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CASE 55—PETITION ORDINARY—DECEMBER 4.

Daniel vs. McHenry.

APPEAL FROM OHIO CIRCUIT COURT.

1. Land fraudulently sold by executory contract before, but conveyed after, the levy of executions thereon, against the fraudulent vendor, *was subject to sale under the executions*—the sale being valid and maintainable, the whole title passed to the purchaser.
2. Possession, under a colorable contract of purchase by the vendee, being fraudulent and voidable by the judgment creditors of the fraudulent vendor, was not adverse to the fraudulent vendee, but in trust for him.
3. Possession of land acquired after the levy of executions thereon, was not adverse to the purchaser at the sale under the executions, because the purchase, and the rights of the purchaser, relate back to the levy. Nor can the sale, by reason of such possession, be regarded as champertous.
4. A sale of more land than was authorized by the executions *is binding on the purchaser, at the owner's option; but such sale is voidable, at the owner's option.* The owner may, therefore, affirm the sale or waive an avoidance, or by his conduct become estopped from urging it. *Such sale is not absolutely void, but may be avoided.*
5. In this case, the land appears to have been sold for sixty-two dollars more than was authorized by the executions, the execution defendant having acquiesced in, and made no objection to the sale for more than a year. In an action by the purchaser against the fraudulent vendee of the execution defendant, for possession of the land, the execution defendant not being made a party, and no objection being made in the circuit court to the sale, or title, of the purchaser, on account of such excess, it cannot, for the first time, be made an available defense in the Court of Appeals, by such fraudulent vendee.
6. Inadequacy of the price for which land was sold under executions, cannot be complained of, by either the execution defendant, or his fraudulent vendee, when such inadequacy resulted chiefly from their own misconduct.

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Daniel vs. McHenry.

JOHN C. TOWNSEND,
A. J. JAMES, and
HARLAN & NEWMAN, For Appellant,

CITED—

Taylor's Landlord and Tenant, secs. 439 *to* 441.
7 *Monroe*, 616; *Blight's heirs vs. Tobin.*
7 *Dana*, 389; *Howell's heirs vs. McCreary.*
2 *Mon.*, 413; *Busey vs. Hardin.*
3 *Mar.*, 619; *Patterson vs. Carneal.*
6 *Mon.*, 30; *Pepper vs. Commonwealth.*
2 *J. J. M.*, 68; *Davidson vs. McMurtry.*
7 *J. J. M.*, 625; *Carlile vs. Carlile.*
3 *Dana*, 235; *Stover vs. Boswell's heirs.*
5 *Dana*, 277; *Addison vs. Crow.*
7 *Dana*, 209; *Adams vs. Keiser.*
9 *B. Mon.*, 35; *Gearhart vs. Tharp.*
12 *B. Mon.*, 231; *Isaacs vs. Gearhart.*
Revised Statutes, title "Execution," art. 13.
3 *Mon.*, 339; *Knight vs. Applegate.*
2 *B. Mon.*, 454; *Shafer vs. Estes.*
9 *Dana*, 348; *Caleb vs. Field.*
5 *Mon.*, 481; 7 *J. J. M.*, 388.
6 *J. J. M.*, 481; 7 *Dana*, 510.
6 *B. Mon.*, 373; *Hardin*, 544.
3 *Littell*, 134; *Hays' heirs vs. Shawan.*
2 *Mar.*, 225; *Logan vs. McChord's heirs.*
4 *Mon.*, 239; *Stone, &c., vs. Ramsey.*
1 *Bibb*, 611; 2 *Bibb*, 311.
4 *B. Mon.*, 299; *Pearson vs. Rockhill.*
3 *B. Mon.*, 550; *Ford vs. Williams.*
6 *B. Mon.*, 609; *Worland vs. Kimberlin.*
7 *B. Mon.*, 357; *Brown vs. Foree.*
7 *B. Mon.*, 369; *Kendall vs. Hughes.*
7 *B. Mon.*, 361; *Brown vs. Smith.*
1 *Met.*, 401; *Short vs. Tinsley.*

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HENRY D. McHENRY, For Appellee,

CITED—

Civil Code, sec. 125.
14 *B. Mon.*, 248; *Petty vs. Malin.*
18 *B. Mon.*, 82; *Morton vs. Waring's heirs.*
3 *Met.*, 434; *Denton vs. Logan.*
M. & B.'s Statutes, 1463.
1 *Mon.*, 154; *Smith vs. Moreman.*
3 *Mon.*, 272; *Terry vs. Blythe.*
Revised Statutes, sec. 1, 1 *Stanton*, 482.
5 *B. Mon.*, 238; *Halls vs. Oldham.*
2 *Bibb*, 518.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Under six executions issued on six several judgments against Christopher Thomas, and all levied on a tract of land of about two hundred and forty acres, the appellee, H. D. McHenry, bought the entire tract for the amount considered collectable by the executions, and which was not more than half the value of the land; and the sheriff, having so returned him as highest bidder, and there being no redemption, conveyed the legal title to him as purchaser, on the satisfaction of the executions.

The appellant, R. J. Daniel, claimed the land under an executory sale of it to him by Thomas, a few days before the date of the judgments and a conveyance of the legal title executed after the levy of the executions; and, having taken possession, and claiming to hold it rightfully through several tenants, the appellee sued him and them in an action of ejectment, which, on his answer asserting a superior equity, was, on his motion, transferred to the equity docket. After full preparation, the chancellor adjudged the land to the appellee.

The principal question litigated was, whether, as charged by the appellee, but denied by the appellant,

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the sale and conveyance by Thomas were fraudulent and voidable by his creditors; and this court, on a careful consideration of all the facts, adjudges it fraudulent and rightfully avoided by the judgments and executions of some of those creditors. To recite the facts conducing to this conclusion is deemed unnecessary. The collusion is too transparent to need demonstration by argument.

The land was, therefore, subject to the sale under the executions; and if that sale be valid and maintainable, the whole title is in the appellee, and the judgment in this case, therefore, right.

But, on this hypothesis, the appellant urges, in this court, two objections to the appellee's title, and, consequently, to the judgment of eviction. 1st. That the appellant was, at the time of the sale under executions, in the adverse possession of the land, claiming title thereto; and that, therefore, the sale was champertous and void; and, 2d. That the amount reported as bid by the appellant exceeded by about sixty-two dollars the aggregate sum for which the sheriff was authorized to sell; and that, therefore, the sale was illegal and void.

The first objection is unavailing—1st. Because, the colorable contract of purchase by the appellant being fraudulent and voidable by the judgment creditors of Thomas, the possession by the appellant was not adverse to Thomas, but in trust for him, though ostensibly otherwise; and, 2d. Because there was not even ostensible possession by the appellant until after the levy of the executions; and the appellee's purchase relates back to that time.

This objection involves a question of fact and a question of law—that is, 1st. Was there the alleged excess? 2d. What is its legal effect under the circumstances of this case?

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1. The quantity of land supposed to be sold was two hundred and forty-two acres; but the quantity actually sold and conveyed was only two hundred and thirty-five acres. The deficit of seven acres is estimated at one hundred and five dollars, exceeds the amount of the assumed excess in the sale, and, consequently, it is quite probable that no more land was sold than the executions authorized. But there is certainly no conclusive or sufficient proof that the sheriff exceeded his legal authority.

2. However that may be, neither the appellant nor Thomas can now equitably avoid the sale for its alleged illegality, as the executions only authorized the sheriff to sell as much land as necessary to pay the amount collectable under them; a sale of more would have been unauthorized and illegal, and, therefore, might have been treated as *void*, and this court has often so adjudged. But this court never decided that such a sale is void in such a sense as not to bind the purchaser at the owner's option, or not to be confirmable by the owner; and any such decision would be unreasonable and inconsistent with some of the cases adjudged by this court, and cited by the appellant's own counsel.

The spirit and *rationale* of the established doctrine do not make such sale, *in all events, necessarily void*, but in effect only voidable at the owner's option. He might, therefore, waive an avoidance, or by his conduct become estopped from successfully urging it, *as hitherto decided by this court*. In this case more than a year elapsed from the date of the sale to that of the conveyance to the appellee, and in the meantime the sale seemed acquiesced in by all parties; and, therefore, there being no offer to redeem, the appellee paid the money bid, and accepted the sheriff's deed as an assurance of an unquestionable

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legal title, apparently acquiesced in by the appellant; and, even in the long and elaborate preparation of this case, Thomas never became a party, nor did either he or the appellant object to the sale on account of the assumed fractional excess in the amount of its product. Nor, although the appellee in his petition set out a complete chain of his title, including the executions and returns thereon, did the appellant either demur or controvert the legality of the sale on the ground of excess; and the pleadings, of course, moulded the issue and the adaptable character of the evidence; and all this also implied an admission that too much land was not actually sold; and do not all of these facts look like both a waiver and an equitable estoppel? It seems to us that the specific objection made *in this court, for the first time*, is inopportune, and should be unavailing in this suit, translated into equity by the appellant himself, and especially unavailing to such a claimant of a spurious equitable right against a prior legal title, procured apparently by fair means, untainted by fraud or dishonor.

The fact that the price paid by the appellee was not fully commensurable cannot, *per se*, invalidate his title. Nor can either Thomas or the appellant complain of the inadequacy resulting chiefly from their own misconduct, in proclaiming that the title was not in Thomas, but *bona fide* and conclusively in the appellant as his vendee; and this self-inflicted loss may be compensatory to the public by this justly punitory example and its conservative tendency.

Judgment affirmed.

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CASE 56—PETITION ORDINARY—OCTOBER 4.

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Johnson vs. Farmers' Bank of Kentucky.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. In an action on an attachment bond to recover expenditures in getting counsel, evidence, and for trouble, &c., all these expenses having been incurred in defending the cause of action, the plaintiff was not entitled to recover anything.
2. In an action on an attachment bond to recover expenses, &c., such expenses, and such only, as were incurred in defending the attachment, can be recovered. If part of the expenses, &c., were incurred in defending the attachment, that part may be recovered.
3. In an action for a malicious suit and attachment, probable cause not being made out, the plaintiff is entitled to recover damages commensurate with the injury.

THOMAS TURNER, and
JOHN RODMAN, For Appellant,

CITED—

Civil Code, secs. 221, 222.

JAMES SIMPSON, and
HAZELRIGG & WINN, For Appellee,

CITED—

8 *B. Mon.*, 51; *Pettit & Owen vs. Mercer.*
14 *B. Mon.*, 500; *Burgen vs. Sharer.*
3 *Met.*, 34; *Trapnall vs. McAfee.*
8 *B. Mon.*, 198; *Doe, &c., vs. Perkins.*
3 *Met.*, 98; *Shultz vs. Morrison, &c.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The branch of said bank, at Mt. Sterling, having been robbed of some sixty thousand dollars by a band of "Con-

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federate" soldiers, under the command of Gen. John H. Morgan, and the appellee being an officer in command of a portion of the forces which captured Mt. Sterling, though, being unwell, was not in actual command, but with said expedition when some portion of it committed this robbery, the bank sued him therefor, under the Kentucky statute approved February 22, 1864, obtained an attachment, on the allegation that he was a resident of Montgomery county, but had left his residence and joined the Confederate military forces, and had it levied upon his land, then under attachment by others.

He denied his responsibility for the robbery, but did not deny the specific causes of attachment, and directed all his defense, evidence, &c., to defeat the cause of action.

After the decision of this court in *Witherspoon vs. Farmers' Bank* (2 *Duvall*, 496), the bank dismissed the suit against Johnson without trial. Johnson then brought this suit upon the attachment bond to recover his expenditures in getting counsel, evidence, and for his time and trouble, &c., upon which issues and trial were had, and the jury found for defendant, under a peremptory instruction of the court; judgment being rendered thereon, he has appealed.

The stipulations of the bond are, "We undertake that the plaintiff, Farmers' Bank of Kentucky, shall pay to the defendant, Thomas Johnson, the *damages, not exceeding one hundred and twenty thousand dollars*, which he may *sustain by reason of the attachment* in this action, *if the order therefor is wrongfully obtained*."

The cause of attachment, as set out by the bank, was his absence from the county of his residence, and entering the military service of the Confederate States, and being a soldier therein, which being a cause of attach-

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ment as provided by law, and not being traversed, and being proved, must, in this action, be regarded as true.

All the costs, expense, and trouble of appellant in the first suit were in defending the cause of action set out against him, and not a cent was expended in defending the causes of attachment; for these were not controverted. This, then, presents the question as to how far the plaintiff in that action was liable in said bond.

It will be observed that the covenant is to pay the *damages by reason of the attachment, if the order therefor is wrongfully obtained.* There is no covenant to pay *all costs* and damages, as there was in the case of *Pettit, &c., vs. Mercer* (8 *B. Mon.*, 51), brought under the statute of 1838 (3 *St. Laws*, 116); and, because of that covenant, the plaintiff was held responsible for the payment of all the costs of the *action*, and not alone for the costs of the attachment.

The bond now under consideration was executed as provided for in section 224, Civil Code, that plaintiff must execute a bond stipulating "that the plaintiff shall pay to the defendant all *damages* which *he may sustain by reason of the attachment, if the order is wrongfully obtained.*"

In *Taylor vs. McCracken* (*MSS. Opin., Summer Term*, 1854), this court decided, in a suit to foreclose a mortgage and an injunction and attachment thereon out of chancery, in which the contest turned upon the validity of the mortgage, because of fraud, and which defense was sustained, and by reason thereof the injunction and attachment were discharged, that the defendant would have been at the same expense, trouble, &c., in defending the mortgage, and therefore he was not entitled to recover as damages therefor on the injunction and attachment bond.

And in *Burgen vs. Sharer* (14 *B. Mon.*, 498), in which Chenault had obtained an injunction against Burgen, for-

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bidding him to open a road, alleging that the order of court under which he was proceeding was illegal, and entered into bond, with Sharer as security, stipulating to "pay to defendant the *damages*, not exceeding five hundred dollars, *which he may sustain by reason of the injunction* in this action, if it is finally decided that said injunction ought not to have been granted," this court held that "the injunction prevented him from opening and using the road, *and the deprivation of its use was the only injury that he sustained in consequence of its having been improperly obtained*."

The court proceeded to say that the plaintiff in that action might have prayed for a perpetual injunction on the final hearing, without having sued out an injunction to operate during the litigation, in which case the labor, costs, and expenses of the defense would have been the same; and that this proves that the costs and expenses of the suit are not occasioned by the injunction, and, consequently, are not embraced by the terms of the bond.

In *Trapnall vs. McAfee* (3 *Met.*, 34), in a case of suit upon debt; and attachment thereon, judgment by default for the debt, but the cause of attachment contested, and judgment thereon for defendant, in suit on the attachment bond, this court held that the expenses grew out of *defending the attachment*, and not out of defending the cause of action, as no defense to it was put in, and were therefore recoverable as damages on the stipulation of the bond to pay defendant such damages as he may sustain.

The same principle runs through all these cases, and is very clear and intelligible; that is, if the whole costs turn upon the defense to the cause of action, then these are not recoverable upon the attachment bond; but if incurred in defending the causes of attachment alone,

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then they are recoverable; but if, as is often the case, they are incurred partly in defending the cause of action and partly in defending the cause of attachment, then they are recoverable so far as applicable to the attachment and expended in its defense. In this case, the whole expense was incurred in defending the cause of action; and although, by defeating it, the attachment would also be defeated, yet the expense would have been precisely the same had there been no attachment; and, as said in *Burgen vs. Sharer*, this proves that no part of the expense or trouble was incurred because of the attachment.

But appellant's counsel seems to think this a great absurdity, because then any one, without reasonable cause of action, could bring a suit against any non-resident or absent defendant; and though his cause of action and attachment should be defeated, the defendant would have no remedy. This argument is wholly based upon the ignoring the legal remedy by action for a malicious suit and attachment; but in that kind of action the damages are recoverable upon the want of probable cause, which, not being made out, the damages are commensurate with the injury, and this shows the wisdom of the rule recognized in the recited cases.

Previous to the adoption of the Revised Statutes and Civil Code, the plaintiff's petition need not be sworn to, nor was any statement under oath required that the debt was just, due, &c., to obtain an attachment; but, since the adoption of the Code, all pleading, by sections 142 and 143, are required to be verified, save in a few specified instances to which this case does not belong, and the party is required to state that his claim is just and he believes he will recover thereon; still, this is not a cause of attachment, though a requisite to obtain one; the justice

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of this claim had to be verified whether an attachment was or not obtained. There is nothing, therefore, in this requirement authorizing the adoption of a new rule as to costs in attachment suits or a departure from the old and settled one. The existence of the debt upon which the attachment was founded was just as essential to its maintenance before the adoption of the Code as since, though it need not then be verified by the plaintiff's affidavit; yet, when the cost was incurred in defending the cause of action, and not the cause of attachment, it was not allowed against the security in the attachment bond. As the plaintiff, before he obtains an attachment, must execute the necessary covenant with good security, the vexation and harassment by insolvent suitors, so vehemently apprehended, is more imaginary than real, and quite as applicable to their entire right of action as to their right of attachment; yet no law requires them to give bond and security in order to maintain their action.

The land of the defendant had been previously attached by others, for claims of from thirty thousand to forty thousand dollars, and the evidence does not show that the bank in any manner ousted the appellant from possession by its levy, and, therefore, fails to show any cause of action by reason thereof.

There being no defense to the cause of attachment, and as nothing was recoverable on the attachment bond, because of the defense to the cause of action, and the only recovery of the plaintiff on defeating his cause of action would be legal costs, unless in an action for malicious suit and attachment want of probable cause should be made out, the peremptory instruction to find as in case of non-suit was right, and the judgment is, therefore, affirmed.

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CASE 57—PETITION ORDINARY—DECEMBER 4.

Union Insurance Company of Louisville vs. Groom.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. The Civil Code merely regulates, but does not require, a motion for a new trial in ordinary actions.
2. A motion for a new trial is not indispensably necessary to give the Court of Appeals jurisdiction of an appeal taken from a judgment in an ordinary action, in which *both law and facts were submitted to the judge, the authenticated bill of exceptions purporting to recite all the evidence on the trial.* An intimation to the contrary in *Humphreys vs. Walton* (2 *Bush*, 580), was *obiter*, and is not regarded as authoritative or right, if it could, as we think it ought not to, be understood as intending more than that, unless such motion be made within a prescribed time, the court would not be bound to hear it or sign any bill of exceptions so as to bring the case to this court.
3. Substantially, there is a perfect analogy between the decision of a chancellor on the facts embodied in the record and a judgment by a common law judge on the facts spread upon the record by bill of exceptions, and no consistent reason is perceived why a *motion for a new trial* should be required in either case, or in one and not in the other.
4. The presumption is reasonable, that if the verdict of a jury is unsustained by the facts, the presiding judge who has given no opinion on them will, on motion, grant a new trial, which is his incidental province in superintending jury trials; and, consequently, unless he has refused a new trial, the Court of Appeals will not grant it to a recusant party, who would not seek it first in the proper forum.
5. On an appeal from the judgment of a judge in an action wherein both law and facts were submitted to him, the Court of Appeals will consider the judgment of the judge just as it would the verdict of a jury for whom he was substituted by the parties.
6. An insurance company is responsible for injury done to eight mules prudently stationed on a steamboat, by an escape of steam on the boat

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from an unknown cause, without the fault of the officers of the boat. This injury is held to have been caused by one of the perils of the river covered by the policy on the mules.

7. Excepting barratry, which is specially insured against, and negligence or unskillfulness of the carrier, uninsured against by the policy, "perils of the sea" or of "the river," as insured against in marine policies, are generally understood to mean dangers peculiarly incident to the insured goods on that element in the craft used for their transportation, and to which they would not be liable on land.

WM. ATWOOD, For Appellant,

CITED—

Emerigon on Insurance (*Meredith*), *chap.* 12, *sec.* 1, *pp.* 287, 288.

5 *Maule & Selwyn*, 461; *Cullen vs. Butler.*

1 *Duer*, 159; *Moses vs. Sun Mutual Ins. Co.*

Hopkins' Manual of Marine Insurance, 135.

16 *B. Mon.*, 679, 682, 692, 696; *Bentley vs. Bustard.*

Arnould on Insurance, 793, 802, 756, 757, 772, 773, 774, 842, 844.

Phillips on Insurance, 3*d ed.*, *secs.* 1099, 1086, 1089, 1090, 1100, 1102, 1105, 1143, 1126.

3 *Kent's Com.*, 5*th ed.*, *pp.* 300, 301, 299.

8 *Peters' S. C. R.*, 585; *Hazard vs. New Eng. Marine Ins. Co.*

12 *Gray*, 603; *Baker vs. Manufacturers' Ins. Co.*

3 *Washington C. C. R.*, 159; *Coles vs. Mar. Ins. Co.*

1 *Caines*, 234; *Barnwell vs. Church.*

2 *Sumner*, 197; 9 *Eng. Law & Eg. R.*, 461.

11 *Ohio*, 147; *Perrin vs. Protection Ins. Co.*

9 *Mo.*, 411; *Citizens' Ins. Co. vs. Glasgow.*

14 *Howard's S. C. R.*, 351; *Genl. Mut. Ins. Co. vs. Sherwood;* 4 *Bingham*, 607.

Phillips on Insurance, 5*th ed.*, *sec.* 1051.

2 *Starkie's R.*, 323; *Stuart vs. Crawley.*

8 *Humphrey's Tenn. R.*, 49; *Porterfield vs. Brook.*

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13 *B. Mon.*, 318; *Fireman's Ins. Co. vs. Powell.*
3 *Barnwell & Alderson*, 389; 5 *Ib.*, 101.
5 *Bingham's New Cases*, 519; 43 *Penn.*, 491.
8 *Pick.*, 14; 3 *Walls & Sargeant*, 144; 12 *Gray*, 603.
2 *Parsons on Maritime Law*, 252, *and note* 2.
Civil Code, secs. 74, 576, 577, 367, 369.

E. S. WORTHINGTON, For Appellee,

CITED—

4 *J. J. M.*, 245; *Marshall vs. Dudley.*
Molloy, 8*th ed.*, 1744, *book* 2, *p.* 291.
Emerigon on Insurance (*Meredith*), *chap.* 1, *p.* 2; *chap.* 12, 287–8.
2 *Arnould on Insurance*, 793, 1340, 1342.
2 *Parsons on Maritime Law*, 213, 220, *and n.* 4.
1 *Phillips on Insurance*, 3*d ed.*, *secs.* 626, 627, *and sub-sec.* 1099.
3 *Kent's Com.*, 299.
11 *Ohio*, 147; *Perrin vs. Protection Ins. Co.*
4 *Bing.*, 607; *Siordet vs. Hall.*
13 *B. Mon.*, 311; *Fireman's Ins. Co. vs. Powell.*
2 *Phillips on Ins.*, 677, *sub-sec.* 2147.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

This appeal brings before this court for revision a judgment for six hundred dollars, in an action by the appellee against the appellant on a policy insuring against the perils of the river a lot of mules shipped on the steamboat "Lady Gay," from the city of Louisville to Friar's Point, on the Mississippi river.

The petition alleged that eight of the insured mules were scalded on the voyage by some unexplained escape of steam, which reduced their value to the extent of six hundred dollars; and on a full issue and much testimony, the judge, to whom both law and facts were submitted,

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rendered judgment for the amount claimed in the petition.

An authenticated bill of exceptions purports to recite all the evidence on the trial; but, there having been no motion for a new trial, the preliminary question, whether, without such motion made and overruled, this court can entertain the appeal, meets us at the threshold.

The Code, merely regulating but not requiring a motion for a new trial in this class of cases, sheds no new light on this question, which must, therefore, be decided on common law principles and analogies.

To authorize the revision and reversal of a decree in equity, no petition for a rehearing has ever been required, because the chancellor, having once decided the whole case on both the law and the facts, may not be expected to revoke it, and need not be required to repeat it before this court can rectify it. An intimation to the contrary in *Humphreys vs. Walton* (2 *Bush*, 580), was *obiter*, and is not regarded as authoritative or right, if it could, as we think it ought not to, be understood as intending more than that, unless such motion be made within a prescribed time, the court would not be bound to hear it or sign any bill of exceptions so as to bring the case to this court.

But the presumption is reasonable, that if the verdict of a jury is unsustained by the facts, the presiding judge, who has given no opinion on them, will, on motion, grant a new trial, which is his incidental province in the superintendency of jury trials; and, consequently, unless he has refused a new trial, this court will not grant it to a recusant party who would not seek it first in the proper *forum*; and this has been hitherto adjudged by this court more than once.

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Substantially there is a perfect analogy between a decision by a chancellor on the facts embodied in the record, and a judgment by a common law judge, on the facts spread on the record by bill of exceptions; and we can perceive no consistent reason why we should require a motion for a new trial in either case, or in one and not in the other.

We will, therefore, take cognizance of this appeal, and must consider the judgment of the judge just as we should the verdict of a jury for whom he was substituted by the parties.

The fact that eight of the appellee's mules were injured on the steamboat by steam escaping from some unknown cause, is sufficiently proved; and if the proximate cause should be presumed to have been one of the perils insured against, the judgment is right and not excessive.

Excepting barratry, which is specially insured against, and negligence or unskillfulness of the carrier, uninsured against by the policy, "perils of the sea" or of "the river," as insured against in marine policies, are generally understood to mean dangers peculiarly incident to the insured goods on that element in the craft used for their transportation, and to which they would not have been liable on land.

According to this definition, the motive power of the boat in this case, often so destructive when not skillfully regulated and carefully controlled, must be admitted to be a peril of the river to which the mules were liable in their transportation. An escape of steam without the fault of the officers of the steamboat "Lady Gay," and whereby some of the mules, prudently stationed on board, were injured, must be a peril of the river; and, consequently, the only remaining

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question as to the appellant's liability is, whether the proximate cause of the accident in this case was the negligence or unskillfulness of any agent of the boat, for which it, and not the insurer, should be held responsible; and, in this vexed question, the evidence and scientific deductions from it are apparently so conflicting, that, whatever may be the actual preponderance, a verdict either way could not have been consistently set aside; and, consequently, as we must treat the finding of the judge as we should that of a jury, we cannot reverse, but must affirm, his judgment; and, therefore, it is hereby affirmed.

CASE—58—PETITION EQUITY—DECEMBER 4.

Bank of Kentucky vs. Duncan.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. *Notice of dishonor*, to an indorser of a bill of exchange, according to the current of American authorities, if left at his place of abode or business, with any one who may reside there, or be a member of his family, of sufficient age and discretion to take care of it, *should be regarded as a delivery to the indorser;* or, if it is not shown that any person was then within the premises, the leaving of the notice at such place would be so regarded.
2. A memorandum made by a clerk in a bank was read without objection after his death as evidence in this case, showing that he had delivered a notice of protest at the residence of the indorser, by leaving it with his daughter. It is not decided whether said memorandum ought to have been admitted as evidence or not, if it had been objected to.

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Bank of Kentucky vs. Duncan.

BARR & GOODLOE, For Appellant.

J. F. & T. W. BULLITT, For Appellee.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

There are two important questions in this case:

1. Was Duncan responsible to the bank as indorser on Morehead's bill of exchange for three thousand one hundred dollars, which had been dishonored, or was he released for want of due notice?

2. Was the bank responsible to Duncan for two thousand nine hundred and twenty-one dollars and twelve cents, money collected for him whilst he was engaged in the military service of the late "Confederate States of America," and in rebellion against the United States, it being collected on a check drawn by the Bank of Virginia, at Richmond, on the Bank of America, New York City?

The bill of exchange was drawn at Louisville, Ky., and accepted by Morehead, August 30, 1860, at four months' time, payable at the house of J. J. Pierson & Co., New Orleans, Louisiana.

Duncan, in his answer to the suit and attachment of the bank, denies he had any notice of or knew that the bill of exchange had been dishonored

The evidence of notice to Duncan, which was received without objection, consists of the following memorandum made by the clerk of the bank, since dead, whose duty it was to deliver notices: "Received January 8, 1861, with notices directed to C. S. Morehead and Blanton Duncan. Same day *I delivered notice at the residence of Blanton Duncan, left with his daughter;* also, I left notice at the office of C. S. Morehead with his son, he being absent.

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The evidence shows Duncan had only two daughters, and these respectively of the ages of four and seven years.

It is said in *Story on Bills* (*sec.* 297), "If the notice is to be given to a party in or near the place of the dishonor of the bill, and it is not sent by the general post, it should be sent to, or given at, his place of domicil, or his place of business, and either will be sufficient."

In *Bank of U. S. vs. Merls et al.* (2 *Rob. La.*, 117), the Supreme Court of Louisiana held, that a notice left at the domicil, or place of business, or left in the hands of a slave in the house, was sufficient. The court further stated that they regarded the well-settled law to be, that the notice must be personal, or *left at his residence or place of business.*

And in *Manaden's adm'r vs. Kitchen* (3 *Rob. La.*, 261) the same court held the notary's certificate sufficient which showed that notice of the protest was left at the indorser's domicil, *he being absent.* It was objected that this did not show that the house was shut up, or, if open and inhabited, that the notice was left with any one in the house; but the court held that such language implied that he found the house open, and that though it was customary and perhaps proper to name the person with whom it was left, yet it was sufficient to mention that the notice was left at the party's domicil.

And in *Franklin vs. Verbais* (6 *La.*, 727) the court held the statement that notice was executed by *delivering the letter for G. de Montague to a person at her house* sufficient.

And in *Bank of Louisiana vs. Mansker* (15 *La.*, 115), a certificate stating *that notice was left at defendant's store* was sufficient, notwithstanding it was urged as irregular and insufficient, because it neither showed personal service nor that it was left with a proper person.

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In *Conlon vs. Chaplin* (15 *La.*, 544), the certificate that notice was left at defendant's domicil with a colored woman, he not being in, and there being no white person in or about the premises, the court said: "It has been held by this court that notice of non-payment given indorsers, by leaving it at their dwellings, is sufficient."

In *Cana vs. Friend* (2 *Cr. U. S. Cir. Ct. R.*, 370), held the evidence of the notary was sufficient when he testified that it was general practice to call at the residence of the indorser, and if he was not at home, to deliver notice to any person who came to the door where he knocked, and to request such person to deliver it to the indorser.

In *Lord vs. Appleton* (15 *Maine R.*, 270), notice was left at defendant's office, with a person there supposed to be a partner, but who in fact was not, nor did it appear who he was, yet this was held good, as the office being open, the person with whom it was left must be presumed to be lawfully there, until it should otherwise appear.

All these cases go to show that leaving notice at the domicil or place of business, whether with some one or not, is to be *prima facie* deemed serving or executing the notice.

In *Parsons on Notes and Bills*, 499, it is said notice left at place of business or abode of the party, with any one who is found there, will, ordinarily, be sufficient.

We think the great current of American authority establishes, that the leaving a notice at the place of abode or business of a party, with any one who may reside there or be a member of the family, of sufficient age and discretion to take care of it, should be regarded as a delivery to the person; or, if it is not shown that any one was then within the premises, the leaving it at such place would be so.

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The only serious difficulty in this case is to determine which of the daughters should be presumed to have received it, and whether either was of sufficiently mature years.

It may fairly be presumed from the memorandum, that the one to whom it was delivered was the one that responded to the call, and of sufficient intelligence to inform the clerk that she was Duncan's daughter; for this is the only source made known to us by which he became possessed of such information; therefore, it may fairly be presumed that it was the elder of the two, and that she was of sufficient age and intelligence to deliver it to her father. We therefore regard the liability of Duncan as fixed on said bill of exchange.

As the bank gave Duncan credit for this money collected on said obligation, and is entitled only to a judgment for the remainder, it becomes useless to discuss or decide the other question presented on Duncan's cross-suit and the reply thereto, though one of public interest.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

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CASE 59—PETITION EQUITY—DECEMBER 5.

Atkinson & Co. vs. Burton.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. Commission merchants are required to sell property consigned to them for sale, within a reasonable time after its receipt, unless otherwise instructed.
2. Property consigned to commission merchants for sale is accompanied with a general direction to sell, when no other instructions are given.
3. Commission merchants in New York, for failing to sell tobacco consigned to them for sale within a reasonable time after its receipt, are liable for its value. Having held the tobacco much longer than a reasonable time for its sale, and until it had depreciated in price, they are held responsible for its value as if converted or appropriated to their use, at the expiration of five months after its receipt, which, in this case, is held to have been a reasonable time for selling.

I. & J. CALDWELL and
BULLOCK & ANDERSON, For Appellants,

CITED—

Story on Agency, secs. 131–34, 185, 186, 199.
1 *Parsons on Contracts, pp.* 80, 81.
1 *Greenleaf, sec.* 88.
5 *Mon.*, 78; *Martin vs. Wade's ex'rs.*
Civil Code, sec. 406.
4 *Met.*, 118, 119; *Duncan vs. Wickliffe.*
Story on Bailments, sec. 455.

BRUCE & RUSSELL, For Appellee,

CITED—

Civil Code, sec. 364.
4 *Bibb*, 282; *Francis vs. Castleman.*
1 *Parsons on Contracts*, 80.
14 *Peters*, 479.

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JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The plaintiff in this action sought to recover one thousand nine hundred and ninety-two dollars and seventy-three cents, with interest from the 1st day of January, 1865, for the net proceeds of eleven hogsheads of tobacco, which he consigned to the defendants from St. Louis, Missouri, in September, 1864, for sale by them as commission merchants in the city of New York, for which he alleged the defendants realized said sum, and therefore became indebted to him, with interest from the 1st day of January, 1865.

The defendants answered the plaintiff's petition, and admitted that they received the tobacco as commission merchants for sale, but deny they realized therefor the sum claimed, or that they were indebted in that amount. They stated that one hogshead only of said tobacco was sold by them on the 22d of November, 1864, and the balance was not sold till the 15th of December, 1865, the plaintiff having instructed them to use their own judgment in holding or selling the tobacco; and they exhibited what they alleged to be a correct account of the sales and their credits, showing a net balance in their hands of five hundred dollars and eighty-six cents, for which they consented that judgment might be rendered against them.

On the report of a commissioner to ascertain the amount due the plaintiff, the court rendered a judgment for the plaintiff for one thousand nine hundred and seventy-one dollars and eighty-one cents, and the defendants have appealed from that judgment.

It is true, as suggested for the appellants, no cause of action is alleged in the petition for neglect in failing to sell the tobacco; but the action rests on the ground that the defendants, by sale or appropriation of the tobacco,

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became indebted to the plaintiffs in said sum of one thousand nine hundred and ninety-two dollars and seventy-three cents for its proceeds.

There is some contrariety of evidence as to the quality and value of the tobacco; but the evidence seems to sustain the balance in favor of the plaintiff, as reported by the commissioner and adjudged by the court, if the order of reference, prescribing the basis of the report of the commissioner, was right. That order, instead of directing the commissioner to charge the defendants with the net proceeds of the tobacco according to the proof of actual sales, whether made within a reasonable time or not, directed him to report "the amount due plaintiff from defendants, charging defendants with the market value of the tobacco in New York at the expiration of a reasonable time for the sale of it after its arrival in New York, and crediting the charges on said tobacco paid by them and proven."

The court thus treated the tobacco, after a reasonable time for selling it had elapsed, as having been appropriated or converted by the defendants, or withheld from market for purposes of their own, if not actually sold at an earlier period than that which they alleged, and the evidence conduced to prove, and devolved on them the loss resulting from what appears to have been an unusual and extraordinary decline in the price of tobacco on the New York market.

It is a well-settled principle, that an agent who receives and undertakes to sell the property of another, is required by his undertaking, in the absence of special instructions, to use due diligence to sell it; and the law will not imply an unlimited discretion in the agent to sell the property or keep it on hand indefinitely, as he might his own property, but he must sell the property, having, however, a

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reasonable time allowed him for doing so, without unnecessary loss to his principal. (*Frances vs. Castleman*, 4 *Bibb*, 282; *Story on Agency*, *sec.* 186.)

In this case it was alleged by the plaintiff, and not controverted by the defendants, that the tobacco was consigned to, and received for *sale* by, them as commission merchants; thus a general direction to sell accompanied the tobacco into their hands, and to avoid liability for neglect, or responsibility for the property itself, as converted or appropriated to their use, the burthen was upon them of proving that they withheld the tobacco from sale beyond a reasonable time for doing so under instructions from the plaintiff; and it did not devolve on him, in case no such instructions were given, to prove a further or other order for the sale of the tobacco than that which accompanied its consignment to the appellants. They alleged, but wholly failed to prove, that they withheld the tobacco from sale under the plaintiff's instructions.

It was not material, therefore, whether the facts proved by the witness, O'Bannon, were sufficient to show that the appellants were specially requested by letters from the appellee to sell the tobacco or not.

From these views it results, that, in our opinion, the chancellor properly adjudged that the sales should have been made by the appellants in a reasonable time after the arrival of the tobacco in New York; and that the appellants should account for the reasonable value of the tobacco in the New York market at the expiration of such time.

It appears that the appellants received the tobacco in New York about the first day of October, 1864; and the commissioner, allowing five months as a reasonable time for selling it, charged the appellants for what appears

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from the evidence to have been its market value on the first of March, 1865, which, including the price of one hogshead sold in November, 1864, amounted to two thousand one hundred and thirty-three dollars and sixty-five cents, from which charges of the appellants were deducted, amounting to four hundred and fifty-five dollars and fifty-one cents, leaving a balance of one thousand six hundred and seventy-eight dollars and fourteen cents as due the plaintiff, which, with interest added, composed the sum for which the final judgment was rendered; and this adjustment seems to us to be as favorable to the appellants as the facts of the case would authorize.

Wherefore, the judgment is affirmed.

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CASE 60—PETITION ORDINARY—DECEMBER 5.

Fletcher, &c., vs. Leight, Barrett & Co.

APPEAL FROM MARSHALL CIRCUIT COURT.

1. "This day came Wm. N. Peterson, who produced a certificate purporting his election as sheriff of Marshall county, and was thereupon duly sworn into office, and with R. Fletcher, P. Palmer, R. F. Stone, S. W. Harrell, James Thompson, *W. B. Ely*, H. Johnson, and Samuel Mathis, as his sureties, executed covenant as required by law." The evidence shows that Ely went into court to sign the necessary bonds of Peterson, and did sign the county levy and revenue bonds; and as these were the only ones presented to him, he left, supposing he had signed all the bonds necessary to be executed by the sheriff. *As "W. B. Ely" did not sign the general bond sued on, and as there is no county court order approving this bond without his name, it is held not obligatory on the other sureties.*

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2. The county court being a court of record, can only speak by its record, especially in the absence of any issue by the pleadings of mistake or fraud.
3. The approval by the county court of an officer's securities must appear of record. However numerous or solvent the proposed securities may be, this does not make the proposed bond official nor obligatory until the court has passed its judgment of approval; indeed, until this, it is not delivered to the Commonwealth, nor can be. It is this approval, by the tribunal designated by law, which completes its execution and delivery, and makes it obligatory.
4. When the county court approves the proposed names and individuals as securities in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it until all the named securities sign it, than he has to accept it without the principal's signature. If he may waive the signature of one security, he may waive more, until all are waived.
5. When the court has designated certain persons and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed in conformity to the judgment of approval, else it is not the approved and accepted bond by the court; and every alteration by the clerk, either in omitting a designated party or substituting another, wholly unauthorized, and his attestation to such a bond of no validity.
6. When the principal has proposed certain names as his sureties, and these have been approved by the court, each of the sureties as he signs has both the legal and moral right to expect and rely upon the officers to see that each approved party shall sign it, and not regard it as an executed and delivered obligation until so perfected.
7. The securities who did sign the bond were under neither a legal nor moral duty to see that all the approved parties had signed it, nor to see that the sheriff should execute another bond. They had a right to rely upon the legal discharge of official duty by those whose duty it was to see a proper bond executed, and to dismiss all oversight over it.
8. It is the duty of the court and county attorney to keep a watchful vigilance over official bonds; and the sheriff, in this case, should have been required to execute another bond, and on failure, his office should have been declared vacant.
9. There being no record evidence that the bond as executed was ever approved by the court, nor that the securities who did sign it were

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approved, but the only order shown negativing this, the decision of the circuit court upon the issue of no record, and the peremptory instruction to the jury to find for the plaintiffs, on the special plea of *non est factum*, were both erroneous.

10. The bond itself is no record until sanctioned and accepted by the court, or executed according to its order of approval, which action of the court can only be established by its own records.

P. PALMER, For Appellants,

CITED—

Revised Statutes, *sec.* 8, *chap.* 97, 2 *Stanton*, 398.
Civil Code, *secs.* 414, 2, 3, 4, 2 *Stanton's R. S.*, 339.
Revised Statutes, 1 *Stanton*, 493; *Myers' Sup.*, 213; *M. & B.*, 626.
1 *B. Mon.*, 212; *O'Bannon vs. Huffman.*
5 *J. J. Mar.*, 322; *Flournoy vs. Rubey.*
7 *J. J. M.*, 281; *Carswell's ex'rs vs. Rennick & Wood.*
9 *B. Mon.*, 130; *Commonwealth vs. Davis.*
1 *Met.*, 410; *Lane vs. Kasey.*
1 *Virginia Cases*, 271 (3 *U. S. Digest*, 327); *Commonwealth vs. McCaul.*
1 *Penn. R.*, 129; *Moore vs. Kline.*
4 *Wendell*, 387; *People vs. Van Eps.*
1 *Starkie's Ev.*, *pp.* 291, 298.
2 *Gray*, *Mass.*, 556; *Howe vs. Peabody.*
Williams on Executors, 490, *and notes* 475.
1 *Dana*, 599; *Commonwealth vs. Rodes.*
2 *Duvall*, 377; *Commonwealth vs. Fisher.*
3 *Met.*, 411; *Schneider vs. Commonwealth.*
4 *Dana*, 192; *Bank of Commonwealth vs. McChord & Payne.*
18 *B. Mon.*, 434; *Lisle vs. Rodgers.*
2 *Met.*, 614; *Millet vs. Parker.*
4 *Met.*, 78; *Bivins vs. Helsley.*
2 *Met.*, 542; *Cuffman, &c., vs. Wilson, &c.*

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Chitty on Contracts, new ed., p. 528, *old ed.* 419.
16 *B. Mon.*, 560; *Cook vs. Boyd.*
4 *Cranch*, 219; *Pawling vs. The United States.*
11 *Peters*, 86; *United States vs. Leffler.*

J. C. GILBERT, For Appellees.

[Brief not in the record.]

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

W. N. Peterson, being elected sheriff of Marshall county, at the January term, 1861, of the county court, was qualified, and executed the county levy and revenue bond, with appellants and W. B. Ely as his securities, and intended to execute the general official bond with the same, but by inadvertence W. B. Ely did not sign this latter bond.

The only county court order relating thereto is as follows: "This day came Wm. N. Peterson, who produced a certificate purporting his election as sheriff of Marshall county, and was thereupon duly sworn into office, and, with R. Fletcher, P. Palmer, R. F. Stone, S. W. Harrell, James Thompson, *W. B. Ely*, H. Johnson, and Samuel Mathis *as his securities, executed covenant as required by law.*"

He entered upon the discharge of his office, and had in his hands an execution in appellees' favor, which he did not return for thirty days after the return day thereof; and for this delinquency appellees brought this suit.

The securities made defense, substantially a special plea of *non est factum* and *nul tiel record*, and some others not necessary to be noticed. The court found against them on the plea of *nul tiel record*, and the jury found for the plaintiffs on the other issues under the peremptory instruction of the court.

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The evidence shows that Ely went into court to sign the necessary bonds of Peterson, and did sign the county levy and revenue bonds; and as these were the only ones presented to him, he left, supposing he had signed all that were necessary to be executed by the sheriff.

As he did not sign the bond sued on, and as there is no county court order approving this bond without Ely's name, we are called on to determine whether it was obligatory on the other securities. This is an important and formidable question.

By section 1, article 1, chapter 91, 2 Revised Statutes, 339, every sheriff is required, before he enters upon the "duties of his office," to take the oath therein prescribed, in addition to the constitutional one. By section 3 he is required to execute the prescribed obligation to the Commonwealth, which is the form of the one sued on. By section 4, "the sureties in the bond must be good for the amount of all moneys, except what is payable into the State Treasury, which will probably pass through the sheriff's hands during his continuance in office; *they shall be approved by the county court, and the bond taken by its clerk under its supervision, and witnessed by him or his deputy.*"

The county court being a court of record, can only speak by its record, especially in the absence of any issue by the pleadings of mistake or fraud; the approval, therefore, by the county court, of an officer's securities, must appear of record.

However numerous and solvent the proposed securities may be, this does not make the proposed bond official nor obligatory until the court has passed its judgment of approval; indeed, until this, it is not delivered to the Commonwealth, nor can be. It is this approval by the tribunal designated by law which completes its execution and delivery, and makes it obligatory.

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When the county court, therefore, approves the proposed names and individuals as securities in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it, until all the named securities sign it, than he has to accept it without the principal's signature. If he may waive the signature of one security, he may waive more, until all are waived.

When the court has designated certain persons and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed in conformity to the judgment of approval, else it is not the approved and accepted bond by the court, and every alteration by the clerk, either in omitting a designated party or substituting another, is wholly unauthorized, and his attestation to such a bond of no validity.

Besides, when the principal has proposed certain names as his securities, and these have been approved by the court, each of the securities, as he signs, has both the legal and moral right to expect and rely upon the officers to see that each approved party shall sign it, and not to regard it as an executed and delivered obligation until so perfected.

In *Commonwealth vs. Davis et al.* (9 *B. Mon.*, 130), it is said: "It is further objected that the declaration is defective in not showing that the bond sued on was accepted by the county court. We concede that, without such acceptance, it was not good as a statutory bond; and that although, if executed to the relator, it might have been good as a common law bond, it is of no avail as a bond to the Commonwealth, or as the basis of an action in her name for the benefit of an individual as relator, except so far as the bond and suit upon it are authorized by statute." But the court held that these things were to

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be presumed upon demurrer; in this case it is made to appear by plea and proof.

Our statutes not only authorize the county court and county attorney to keep a supervising, controlling watchfulness over the official bonds of the sheriff, but make it their duty to do so; hence, the sheriff may, from time to time, be compelled by them to execute new bonds when, from any cause, the old ones become insecure, either from some defect therein or from sufficient solvency of the obligors therein. It is the duty of the court and county attorney to keep a watchful vigilance over these official bonds, and Peterson should have been required to execute another bond, and, on failure, his office should have been declared vacant.

The securities who did sign the bond were under neither a legal nor moral duty to see that all the approved parties had signed it, nor to see that Peterson should execute another bond. They had a right to rely upon the legal discharge of official duty by those whose duty it was to see a proper bond executed, and to dismiss all oversight of it.

There being no record evidence that the bond, as executed, was ever approved by the court, nor that the securities who did sign it were approved, but the only order shown negativing this, the decision of the court upon the issue of no record, and his peremptory instruction to the jury, were both erroneous.

The bond itself is no record until sanctioned and accepted by the court or executed according to its order of approval, which action of the court can only be established by its own records.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

Peterson having died, the suit was abated as to him.

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CASE 61—PETITION—DECEMBER 5.

Speak, &c., vs. Mattingly, &c.

APPEAL FROM NELSON CIRCUIT COURT.

1. After arriving at the age of twenty-one years, the defendant prosecuted an appeal to the Court of Appeals, to reverse a judgment of the circuit court, *rendered against her during her infancy. The Court of Appeals affirmed that judgment. As to any matter which was or could have been heard on the appeal, the judgment of affirmance is a good plea in bar to a petition filed in the circuit court* to vacate or set aside the decree appealed from, whether the petition in the circuit court was filed before or after the appeal was taken.
2. Infants and defendants constructively summoned within the times prescribed by law, are allowed by law alternate remedies to retry the cause. *First.* By proper proceedings in the court below; *Second.* By appeal to the Court of Appeals; but they are not allowed to proceed by both remedies, and in the two courts, at the same time. (*Salter vs. Dunn*, 1 *Bush*, 311.)

WM. JOHNSON and
MUIR & WICKLIFFE, For Appellants,

CITED—

Civil Code, secs. 421, 445, 579, 581.
1 *Bush*, 311; *Salter vs. Dunn, &c.*
2 *Bush*, 439; *Cromwell's heirs vs. Mason's heirs.*
18 *B. Mon.*, 775; *McLean vs. Nixon.*
8 *B. Mon.*, 367; *Singleton vs. Singleton.*
14 *B. Mon.*, 213; *Bush vs Madena's heirs.*

J. E NEWMAN and
E. E. MCKAY, For Appellees,

CITED—

18 *B. Mon.*, 670; *Newland vs. Gentry, &c.*
18 *B. Mon.*, 775; *McLean vs. Nixon.*

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5 *B. Mon.*, 362; *Hanna vs. Spotts' heirs.*
5 *Littell*, 77; *Pope, &c., vs. Lemaster.*
14 *B. Mon.*, 213; *Bush vs. Madena's heirs.*
4 *Mon.*, 142; *Blight, &c., vs., McIlroy, &c.*
1 *Met.*, 461; *Dawson vs. Hays.*
1 *Dana*, 201; *Gore vs. Stevens, &c.*
5 *J. J. M.*, 215; *Smart vs. Easley.*
3 *J. J. M.*, 363; *Smart vs. Baugh.*
14 *B. Mon.*, 163; *Tomlin vs. Joyne.*
14 *B. Mon.*, 642; *Wright vs. Arnold.*
8 *B. Mon.*, 542; *Davis vs. Tingle, &c.*
1 *Marsh.*, 562; *Young vs. Young.*
2 *Marsh.*, 464; *Hendrix's heirs vs. Clay.*
3 *J. J. M.*, 492; *Brewer vs. Bowman.*
1 *J. J. M.*, 84; *Fishback, &c., vs. Woodford.*
3 *Dana*, 1; *Higgins vs. Conner.*
1 *Met.*, 609; *Mitchell vs. Berry.*
1 *Bush*, 318; *Salter vs. Dunn.*
12 *B. Mon.*, 591; *Basye vs. Beard's ex'r.*
Civil Code, secs. 579, 580, 581.
5 *J. J. M.*, 610; 3 *J. J. M.*, 625; 2 *Bibb*, 246.
4 *Mon.*, 157; *Baugh vs. Ramsey.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

William Reed, father of appellant, Minerva, in the year of 1843, intending to convey a tract of two hundred acres of land to her and her bodily heirs, through mistake conveyed it to her then husband, J. A. Hagan, and his heirs. The husband died testate, leaving appellee, Mary J., and her brother, who died intestate and without issue in minority, as his only children and heirs-at-law, and devised his estate to them and his surviving wife.

The widow subsequently married Urbine Speak, and had by him seven children. Her father died after she

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had several children by her second husband. After her father's death she and her husband brought suit to have the deed of her father to her first husband reformed, so as to conform to his intentions, to which appellee, Mary J., was made a defendant, and the other children also parties.

Mary J. Hagan was still of non-age when the decree reforming the deed in said suit was rendered; after arriving at full age, and within the time allowed by law, she and her husband, Thos. R. Mattingly, filed a petition to open and set aside said decree, to which her mother and half brothers and sisters were made parties, in which she asserted entire ownership of the land after the expiration of her mother's life interest to one half under her father's will.

Subsequently to the filing this petition, and within the time allowed by law, she and her husband prosecuted an appeal to this court to reverse the decree rendered in favor of her mother and half brothers and sisters, but which this court affirmed.

After the affirmance Mrs. Speak and her children by her then deceased husband, Speak, put in an amended answer to the petition of Mattingly and wife, and set up the affirmance of the original decree as a defense in bar, but which the court overruled, and subsequently opened the decree and set it aside, and dismissed the suit to reform the deed; and Mrs. Speak and her children by her last husband now seek a reversal of that judgment.

The first question to be determined is, whether Mattingly and wife are concluded by their appeal and the affirmance of the first decree, after they had filed their petition to open it, and subsequently to Mary J. Mat-

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tingly's arrival at full age, from setting up any matter which was or could have been heard upon said appeal.

By the provision in section 421, Civil Code, infants, "*within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment*" as may have been rendered against them.

In *McLean vs Nixon* (18 *B. Mon.*, 775), this court held, that, "under the Code of Practice, a judgment which has been affirmed by this court, or which has been entered in pursuance of its mandate, may, no doubt, be vacated by a petition in the circuit court; but it can only be done for some of the causes enumerated in section 579, Civil Code, and for such errors as could not be noticed by this court."

And as the court therein said: "A bill of review was not, under the former practice, barred by an affirmance in this court, nor was a party precluded from filing it on the ground that the decree in the court below had been rendered in conformity with the mandate of this court. But in such cases, no error could be relied upon that might have been presented to and decided by this court. A bill of review might, however, be maintained *upon newly discovered facts, or the recent discovery of written testimony of a permanent and unerring character.*" (*Singleton vs. Singleton*, 8 *B. Mon.*, 367; *Bush vs. Madena's heirs*, 14 *B. Mon.*, 213.)

When Mattingly and wife by appeal sought the judgment of this court and obtained it, and its mandate was entered in the lower court, it was a judgment after she had arrived at age, and must stand, unless reviewed for some of the causes specified in section 579, and upon the proceedings as in section 581, Civil Code.

This judgment of the appellate court, and the circuit court in pursuance therewith, could not be affected or

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vacated by the proceedings of Mattingly and wife to open the original decree because of her non-age; even if it were opened, still there would be the subsequent judgment upon their appeal unopened, and which could only be retried, as before said, for causes arising subsequently, as prescribed in sections 579 and 581, Civil Code. Nor can this conclusion be avoided by saying that no judgment in the lower court was rendered on the affirmance; for if this be true, still the affirmance stands as the subsequent judgment of this court, and is as effectual as if the court below had properly rendered judgment thereon, which it should yet do.

And this view of the case shows the just application of the principle heretofore decided by this court as to non-resident's right to open a decree within five years; yet if, instead of applying for a re-trial within five years, as prescribed in section 445, Civil Code, as to all defendants constructively summoned, they should appeal to this court, that would be an appearance, and a judgment thereon precludes them from reopening the original judgment upon constructive service, because there is now a judgment upon actual appearance. In other words, the law allows them alternate remedies to retry the cause—1. By proper proceedings in the court below; 2. By an appeal to this court; but not by both remedies and the two courts at the same time. (*Salter vs. Dunn*, 1 *Bush*, 311.)

Had Mrs. Mattingly first sought the judgment of this court upon the first decree, before the expiration of her non-age, and before she and her husband proceeded to reopen and retry the cause in the lower court, she likely would not be barred by the affirmance; but, as after she and her husband had commenced such proceedings, they prosecuted an appeal to this court, which affirmed the decree, and which affirmance is the subsequent judgment of

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a court having jurisdiction, and also a subsequent judgment of the court below, if it has entered the proper order on the mandate of this court, she and her husband are barred by these latter judgments until proper proceedings are taken to annul them.

Whatever may have been the rights of Mrs. Speak and her children by her last husband to have had the appeal abated because of the pending suit of Mattingly and wife, yet, as they did not seek its abatement, it must now be regarded as fully as efficacious as if no such suit had been pending.

The subject-matter of litigation, and the issues in the two suits, are precisely the same; that is, the alleged mistake in the original deed, the evidence introduced in the last suit, is of the same precise character; that is, facts detailed from the recollection of witnesses, and not written or more permanent evidence; the witnesses and facts detailed are more numerous, but this is only cumulative evidence.

Wherefore, the judgment is reversed, with directions to dismiss the proceedings of Mattingly and wife to have a retrial of the original decree.

NOTE.—See *Mattingly and wife vs. Speak, &c.*—next case after this.

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CASE 62—PETITION EQUITY—JUNE 26, 1867.

Mattingly and wife vs. Speak, &c.

APPEAL FROM NELSON CIRCUIT COURT.

1. A father intending to convey land to his married daughter and the heirs of her body, through mistake conveyed it to her husband and his heirs. This deed is reformed after the death of both grantor and grantee, upon clear and satisfactory evidence.
2. To authorize the chancellor to annul or modify the terms of a conveyance, or other written instrument, on the ground of mistake as to its contents or legal effect when executed, *such mistake must be established*, and *must not be a mere inference, from the weight of evidence.*

E. E. McKay, For Appellants.

Johnson & Muir, For Appellees.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

It is true, as insisted for the appellants, that to authorize the chancellor to annul or modify the terms of a conveyance or other written instrument, on the ground of mistake as to its contents or legal effect when executed, such mistake must be clearly established, and must not be a mere inference from the weight of evidence. But we think it is satisfactorily shown by the testimony of McAtee, the draftsman, and Mrs. Richie, the female grantor in the deed to Hagan, that the makers of the deed did not intend to so convey the title as in any contingency to exclude their daughter or vest the title in part of her children to the exclusion of the rest. Whether it was intended to vest a particular estate in Hagan or not, the deed furnishes intrinsic evidence that the controlling in-

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tention of William Reed, in making it, was to provide for his daughter and her children, charging her with such provision as an advancement out of his estate.

The decree of the circuit court simply gives effect to this intention, and is not only sustained by the direct evidence, but is in accordance with those reasons and motives, which may be supposed to have influenced the grantors in making a conveyance, in consideration of affection for their daughter, and their natural obligations to her and her offspring.

Wherefore, the judgment is *affirmed*.

NOTE.—The foregoing was not marked for publication until the decision was rendered in case of *Speak, &c., vs. Mattingly, &c.*, which see on page 310.

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The following opinion was misplaced when volume three was published:

CASE 63—PETITION EQUITY—MAY 23, 1868.

Thomas vs. Bertram.

APPEAL FROM LEWIS CIRCUIT COURT.

1. A sale of a part of a tract of land by the patentees in 1807, is held to have implied a grant of an indispensable outlet or passway through the remainder of the tract; and a subsequent purchaser of the then unsold land is held to have taken conveyance subject to that incidental privilege, and his title passed to his successors with the same implied encumbrance.
2. A right of way used from 1807, by agreement of parties was slightly changed, and gates mutually put up in 1815. This arrangement being ratified by subsequent acts, was constructively an express

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grant of the easement. Having been enjoyed and acquiesced in until 1865, the circuit court properly refused an injunction against its use.

3. The law implies a grant of a passway from uninterrupted and continued enjoyment, for more than fifty years, constructively adverse, on presumed claim of right.

GEO. T. HALBERT and
E. C. PHISTER, For Appellant,

CITED—

2 *Hilliard on Real Property, p.* 10

THOMAS and
WADSWORTH, For Appellee,

CITED—

2 *Mct.*, 100; *Hall vs. McLeod.*

2 *Greenleaf's Ev., sec.* 658.

15 *B. Mon.*, 99; *Bowman vs. Wickliffe.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

This appeal seeks the reversal of a judgment dissolving an injunction granted to the appellant on his petition filed in August, 1865, for enjoining the further use of a passway through his land over which the appellee and those under whom he holds, had passed for more than fifty years.

The injunction was resisted and finally dissolved, and the appellee quieted in the continued use of the passway on the ground of original *necessity*, subsequent agreement, and a grant also implied by long use.

The testimony sufficiently shows that both parties hold under a patent for one thousand four hundred and fifteen acres issued to Bullock, Marshall & Marshall, in the year 1807; that Solomon Thomas first bought from the patentees the tract of forty-two acres, on which the appellee, as derivative purchaser, now resides; that said Thomas was in possession and using a passway when the appellant's remote vendor, William Cottingham, bought from

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the same patentees an adjoining tract through which Thomas passed; that such passway was a necessary outlet to the public road leading to the court-house; that all subsequent purchasers of the tract of forty-two acres used the passway for several years without objection by Cottingham, except on one occasion, when, more than twenty years before the institution of this suit, he objected, and, being informed by counsel that he could not availably deny the right, he seemed to acquiesce, and said that he supposed that the right was established; that in 1815 the way was, by agreement, slightly changed to its present location, and gates mutually put up; and that, afterwards, Cottingham assisted the appellee in righting and repairing the way thus designated and yet used; that the appellant, as remote vendee, succeeded Cottingham, and that neither he nor any intermediate occupant seemed to question the appellee's right until this suit was brought.

From these facts the following legal deductions seem to this court inevitable:

1. The sale to S. Thomas implied a grant of the indispensable outlet through the then unsold land of the patentees, as afterwards conveyed to Cottingham.

2. Cottingham took his conveyance subject to that incidental privilege, and his title passed to his successors with the same implied encumbrance.

3. The arrangement of 1815, as ratified by subsequent acts, was constructively an express grant of the easement.

4. The law implies a grant from uninterrupted and continued enjoyment for more than fifty years constructively adverse on presumed claim of right to the way, as now claimed by the appellee and adjudged to him by the circourt court.

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The only opposing testimony is that of Cottingham himself, who, as warrantor, was interested in the result of this litigation, and does not appear to have been made competent by any release executed before his deposition was taken, or even yet ever delivered; but, had he been competent, his testimony, if credible, is clearly outweighed by preponderating evidence and presumptions.

Our conclusion is, that there is no error in the dissolution of the injunction, nor in the decretal assurance of quiet enjoyment hereafter.

And, perceiving no other available error, our judgment is that the decree be affirmed.

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DECISIONS

OF

THE COURT OF APPEALS

OF KENTUCKY.

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WINTER TERM, 1868.

CASE 1—MANDAMUS—DECEMBER 9.

Johnson vs. The Auditor.

APPEAL FROM FRANKLIN CIRCUIT COURT.

If a justice of the peace presides at more than one examining court on the same day, he is entitled to the two dollars per day for each case, to be paid out of the Treasury. (*Revised Statutes, Myers' Supplement* 155–6.)

W. C. GOODLOE, For Appellant,

CITED—

Act of February 17, 1858, 1 *Stanton*, 537.
Act of February 24, 1865, *Myers' Sup.*, 155–6.
Myers' Supplement, 381, 123, 420.

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JOHN RODMAN, Attorney General, For Appellee,

CITED—

Revised Statutes, 1 *Stanton*, 537; *Myers' Sup.*, 155–6.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The only question presented by this appeal is, whether a justice of the peace who presides at an examining court is by law allowed only two dollars *per day*, although he may preside at two or more examining courts on the same day.

The language of the statute is, a justice of the peace, "for presiding at examining court per day, to be paid out of the Treasury, two dollars." (*Mycrs' Sup.*, 155–6.)

Examining courts have not stated times fixed by law to sit, but are convened and held as the necessity or exigency of particular cases may require; and it is certainly true, that if a justice of the peace should preside at an examining court which should consume but one hour, under the statute cited, he would be entitled to receive two dollars therefor; but if the trial should occupy six or any number of days, he would be entitled only to two dollars per day. But neither the literal interpretation of the language nor its intention limits the fees of the justice to two dollars per day when he presides at more than one examining court. If it had read for presiding at *an* examining court, two dollars per day, there would have been less ambiguity and difficulty as to its meaning, as it would then have indicated that the justice of the peace was entitled to two dollars for each examining court at which he presided in a day; and, without the word "*an*," the sentence is ungrammatical, and not euphonious. We conclude, therefore, that it was omitted by mistake; and with it inserted, the meaning would be

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clear, that for presiding at *one* or each examining court, two dollars per day.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 2—PETITION ORDINARY—DECEMBER 9.

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Morgan, &c., vs. Vance.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. All State, district, county, city, and town officers within this Commonwealth are required by section 1, article 8, State Constitution, to take the dueling oath therein prescribed. This oath cannot be dispensed with by legislative enactment.
2. Persons deprived of the right to hold any office of honor or profit in this Commonwealth, as provided in section 20, article 8, State Constitution, by participating in a duel, or a challenge to fight a duel, *cannot, by law, be rendered eligible* to any such office. *These rights and privileges may be restored* by the pardon of the Governor, after five years from the time of the offense. (*Section* 21, *article* 8, *State Constitution.*)
3. The power conferred upon the General Assembly to prescribe the qualifications of certain officers, as provided in sections 6 and 10, article 6, State Constitution, does not include or authorize the removal by law of disabilities imposed by the Constitution.
4. If an officer is eligible, and has taken such oath as is required by law—the law creating the office not requiring the dueling oath prescribed in the Constitution—his acts are not void, because he did not take said dueling oath. (*Marbury vs. Madison*, 1 *Cranch*, 163; *United States vs. LeBaron*, 19 *How.*, 73; *Same vs. Stewart*, 19 *How.*, 794; *Rice, &c., vs. Commonwealth*, 3 *Bush*, 14.)

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5. If the officer be eligible, and he has taken such oaths as he supposed to be required, and regards his installation as regular, he might be deemed an officer *de jure* as well as *de facto* until a regular proceeding and judgment declaring his office vacant; but—

6. If the incumbent was ineligible, his claim to the office and discharge of its duties, however regular his installation, are no protection to him, and in a suit to hold him responsible he cannot justify under his office. (*Rodman vs. Harcourt & Carico*, 4 *B. Mon.*, 224; *Patterson vs. Miller, &c.*, 2 *Met.*, 493.)

7. So far as the Constitution requires of all officers to take the prescribed oath, and so far as it provides disqualifications upon acts, and not upon judgment of conviction, the Constitution, as the supreme law of the land, executes itself without any extraneous aid by way of legislation, nor can its requirements be so defeated.

HUSTON & MULLIGAN, For Appellants,

CITED—

1 *Met.*, 565; *Tipton vs. Chambers.*

Constitution of Kentucky, sec. 1, *article* 8, *sec.* 6, *article* 6; 1 *Angell & Ames on Corporations, secs.* 30, 37.

Wilcock on Corporations, 12 *Law Library, sec.* 598, *&c.*

Sess. Acts 1867–8, *vol.* 1, *pp.* 306, 582.

2 *Kent's Com., s. p.* 295, *sec.* 13.

9 *Johnson's R.*, 135; *McKinstry vs. Tanner.*

19 *Pickering*, 436; *Sprague vs. Bailey.*

Z. GIBBONS, For Appellee,

CITED—

3 *Met.*, 321; *Revill vs. Pettit.*

1 *Met.*, 565; *Tipton vs. Chambers.*

1 *Met.*, 395; *Brandeis vs. Stewart.*

5 *Dana*, 596; *Williams vs. Wilson.*

Act of February 18, 1868, *Sess. Acts, vol.* 1, 582; *Ib.*, 306.

Constitution of Ky., secs. 1, 3, 7, 11, 20, 15, *article* 8, *sec.* 1, *article* 6.

Revised Statutes, sec. 13, *chapter* 71, 2 *Stanton*, 192; *also* 1 *Stanton, sec.* 1, 186, 192, 246, 253, 307.

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2 *Met.*, 3; *Megowan vs. Commonwealth.*
2 *Swan* (*Tenn.*), 87; *Pearce vs. Hawkins.*
4 *Md. R.*, 189; *Thomas vs. Owen.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellee sued appellants for a stallion, averred to be worth one thousand dollars, and claimed one hundred dollars for his detention. Appellant, Morgan, justified his taking possession and detention of the horse, as collector of the city of Lexington, and because Vance owed the city for local taxes seven dollars.

It appeared from the pleadings that Morgan had executed the proper bond, and entered upon the discharge of his official duties, after his election in March, 1868, but that he had taken no other oath of office than the one prescribed by the amendatory act of February 18, 1868, to the city charter (1 *Ses. Acts.*, 582), which, as to the collector only, requires that he should swear faithfully to discharge the duties of his office, support the Constitution of the United States, and be true and faithful to the Commonwealth of Kentucky, leaving off the dueling oath as prescribed by section 1, article 8, State Constitution, which requires that "*all officers*, before they enter upon the execution of the duties of their respective offices * * * shall take the following oath or affirmation," which, among other things, requires that officers shall swear or affirm, "that, since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons, within this State nor out of it, with a citizen of this State; nor have I sent or accepted a challenge to fight a duel with deadly weapons with a citizen of this State; nor have I acted as second in carrying a challenge, or aided or assisted any person thus offend-

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ing." And by section 20, same article, it is provided, that "any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept, or knowingly carry a challenge to any person or persons, to fight in single combat, with a citizen of this State, with any deadly weapon, either in or out of the State, *shall be deprived* of the right to hold *any office of honor or profit in this Commonwealth, and shall be punished otherwise in such manner as the General Assembly may prescribe by law.*"

"All officers" are required to take said oath. If the term "*all officers,*" as used in section 1 of this article, was of doubtful import, section 20 would remove all uncertainty, as it forfeits the right of *any one*, who shall so engage in a duel or challenge, to hold "any *office of honor or profit in this Commonwealth;*" not that it must be a State or county office, connected with the public service, but if it be any office of honor or profit *within the Commonwealth.*

If this needed further illustration, the fact that town and city officers were regarded as officers within this general designation would be found in section 6, article 6, Constitution, which provides that "*officers* for *towns* and *cities* shall be elected for such terms, and in such manner, and with such *qualifications*, as may be prescribed by law." Having designated such as officers in this article, it can hardly be conceived that these were not intended to be embraced by the general language in the subsequent article 8.

But it is said the *qualifications* of these town and city officers are to be prescribed by law, and this is true; but this in nowise intended to confer upon the Legislature the power to remove constitutional disqualifications; to prescribe qualifications is a different thing to the removal of disabilities. Under the power to prescribe qualifica-

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tions, the Legislature could not authorize the election of a non-resident citizen of another State, nor a person of African descent, nor one convicted of an infamous crime, but may prescribe additional qualifications as to those constitutionally eligible to office, or rather as to those not constitutionally ineligible.

So by section 10, article 6, "the General Assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial and executive officers as shall, from time to time, be necessary and proper;" but this will not authorize the Legislature to allow by law persons to hold such offices as are inhibited by the Constitution from holding any office of honor or profit within the State.

The Constitution is consistent with itself; and when it attaches a disqualification to the holding of any office, it is not to be construed as meaning that the Legislature may remove this under the power to prescribe the qualification as to such offices as it may create.

This is made the more palpable by section 21, article 8, Constitution, which authorizes the Governor, after *five years from the time of the offense*, to pardon those who may have participated in anywise in a duel, and which is "to restore him or them to all the rights, privileges, and immunities to which he or they were entitled before such participation. *And upon the presentation of such pardon, the oath prescribed in the first section of this article shall be varied to suit the case.*"

It is the pardon which is to restore them, and this can only be granted by the Governor, and that not within five years of the offense, and the oath is not to be varied until the pardon.

The policy of the Constitution was to suppress the condemned practice of dueling; first, by requiring of all

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officers to swear they have not participated in such; next, by attaching a disqualification to hold *any office of honor or profit*, beyond any remedy, for five years, and then not until pardoned by the Governor.

It is not perceived why the Legislature may not quite as easily waive the necessity of swearing that the officer will support the Constitution of the United States, or that he will be true and faithful to the Constitution and laws of the State, as to set aside the necessity of taking this dueling oath. If they may do the one, so they can do the other, until all the constitutional requirements may be removed by legislative enactment, to meet some emergency or private interest. But it neither appears in the pleadings nor proof that Morgan is so constitutionally disqualified; and, although if he is so ineligible, this enactment cannot render him eligible, nor waive the necessity of his taking the dueling oath; yet, if he is not ineligible, the failure to take it, as it was dispensed with by said enactment, would not render his acts void. As held by the Supreme Court of the United States in *Marbury vs. Madison*, 1 *Cranch*, 163; *U. S. vs. LeBaron*, 19 *How.*, 73; *Same vs. Stewart*, *same*, 79, when a person has been nominated to, and confirmed by the Senate, and his commission signed, his appointment is complete, and on complying with the conditions of the law his right to enter upon the discharge of its duties and enjoy the office is perfect; but this in nowise determines that if he should fail to pursue every direction, of either the Constitution or laws, that his official acts would be void and his office vacant.

In *Rice vs. Commonwealth* (3 *Bush*), this court held the official acts of the police judge of Owingsville good, though he had taken the official oaths before a notary public, who had no legal authority to administer such oaths, though this was in a collateral proceeding.

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If the officer be eligible, and he has taken such oaths as he supposed to be required, and regards his installation as regular, he might be deemed an officer *de jure* as well as *de facto*, until a regular proceeding and a judgment declaring his office vacant. But as was held by this court in *Rodman vs. Harcourt & Carico* (4 *B. Mon.*, 224), when the incumbent was ineligible, his claim to the office and discharge of its duties, however regular his installation, are no protection to him, and in a suit to hold him responsible he cannot justify under his office. So, also, it was held by the Supreme Court of Tennessee, in *Pearce vs. Hawkins* (2 *Swan*, 87).

In this case, Morgan had taken the only oath which he supposed was requisite. His election and installation into office appear regular in all things else. It nowhere appears in the case that he was ineligible, or that he could not take the dueling oath if it be required; and as if, upon proper proceedings to vacate his office, because he had not taken said oath, it should appear before the trial that he had so taken it, we cannot doubt but that this would defeat any judgment of vacation. We regard the judgment sustaining a demurrer to Morgan's answer as erronous, also the judgment in plaintiff's favor upon the submission of the facts to the court. But upon the return of the cause, either party should be permitted to amend their pleadings—the plaintiff to aver that Morgan is constitutionally ineligible to said office, because falling within the denunciations of sections 20 and 21, article 8, State Constitution, if this be the fact; and Morgan permitted to amend and show that he has taken said dueling oath, if the parties should so desire, within a reasonable time.

We regard the jurisdiction of this court clear upon the facts of this case.

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So far as the Constitution requires of all officers to take the prescribed oath, and so far as it provides disqualifications upon acts and not upon judgment of conviction, the Constitution, as the supreme law of the land, executes itself without any extraneous aid by way of legislation, nor can its requirements be so defeated.

The case of *Thomas vs. Owens* (4 *Md.*, 191) has but little, if any, application to this case. It involved the question, under the Constitution and laws of Maryland, when the comptroller was to be deemed in office, and from what time his salary began, whether at the date of his election or the date of taking the official oaths.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

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CASE 3—INDICTMENT—DECEMBER 10.

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McBride vs. Commonwealth.

APPEAL FROM HENDERSON CIRCUIT COURT.

1. The grand jury, under section 36, article 4, of the Constitution, has jurisdiction to return an indictment against a jailer "*for permitting the jail to become so filthy as to endanger the comfort, health, and lives of the prisoners.*"
2. Whatever may be the powers of the county judge to impose fines upon a jailer for a violation of the rules prescribed by the county court for a willful neglect of official duty, an indictment is a proper remedy provided by the Constitution (*sec.* 36, *art.* 4); and being so provided, no legislative enactment is necessary to give the grand jury jurisdiction.

   NOTE BY REPORTER.—This case overrules *Commonwealth vs. Mitchell* (3 *Bush*, 39), so far as it is inconsistent with the opinion in this case.
3. As the judgment and conviction of the jailer on an indictment for willful neglect of official duty, in permitting the jail to become so filthy, &c., was only for a fine, the court does not say or intimate whether the office became vacant on the judgment and conviction, by virtue of the express terms of the Constitution.

JOHN W. CROCKETT, For Appellant.

JOHN RODMAN, Attorney General, For Appellee,

CITED—

Criminal Code, sec. 349.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellant, being jailer of Henderson county, was indicted, tried, and found guilty of willful neglect of his official duties, in permitting the jail to become so filthy as to endanger the comfort, health, and lives of the pris-

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oners then in his custody, and a fine of seventy dollars assessed against him, from which he prosecutes this appeal.

The only error assigned is, that the grand jury had no jurisdiction of the case, as exclusive jurisdiction belonged to the county court, by virtue of section 11, chapter 91, 2 Stanton's Revised Statutes, 349, which enacts that "it shall be the duty of the county court, from time to time, to prescribe rules for the government and cleanliness of the jail, and the comfort and treatment of prisoners; and the judge of the county court shall inspect the jail at least once a month, and shall have power, by fine or otherwise, to enforce the rules, and punish the jailer for neglect thereof or disobedience thereto."

By section 9, same chapter, the county court "shall have power to suspend the jailer of the county from acting as such for such period as it may deem right, when the public interest shall imperatively demand the same."

By section 36, article 4, State Constitution, it is provided, that "judges of the county court and justices of the peace, sheriffs, coroners, surveyors, *jailers*, county assessor, attorney for the county, and constables, *shall be subject to indictment* or presentment for malfeasance or misfeasance in office, *or willful neglect in the discharge of their official duties*, in such mode as may be prescribed by law, subject to appeal to the Court of Appeals; and, upon conviction, their offices shall become vacant."

In *Horton vs. Commonwealth* this court held, that the words in said section, "in such mode as may be prescribed by law," refer to official duties that may be so prescribed, and that the officers named therein are subject to indictment by the terms of the Constitution, and that it is not necessary there should be any enactment by the Legislature declaring the mode of proceeding in such cases.

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And in *Lowe vs. Commonwealth* (3 *Met.*, 238) this court held, that the Legislature could not authorize the county judge or county court to permanently suspend the jailer, and declare his office vacant, because such enactment would conflict with said provision of the Constitution, which authorized an ouster from the office on an indictment and judgment of conviction, or by impeachment alone.

It is plain, therefore, whatever may be the powers of the county judge to impose fines for a violation of the rules prescribed by the county court, that, for a willful neglect of official duty, an indictment is a proper remedy provided by the Constitution; and, being so provided by the supreme law of the land, no legislative enactment is necessary to give the grand jury jurisdiction.

In this case, the judgment is alone for the fine assessed; whether the office became vacant on the judgment of conviction for willful neglect of official duty, by virtue of the express terms of the Constitution, we need not say nor intimate; but that the grand jury had jurisdiction of the offense is clear; and as no exception was taken to the evidence or ruling of the court, and no bill of exception containing the evidence or instructions is in the case, we cannot disturb the judgment.

Wherefore, it is affirmed.

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CASE 4—PETITION EQUITY—DECEMBER 10.

Petitt & Co. vs. First National Bank of Memphis.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. A stockholder in a bank is a competent witness for the bank (*Civil Code, sec.* 675; *Covington and Lex. R. R. Co. vs. Ingles*, 15 *B. Mon.*, 641; *Lackey vs. Richmond and Lancaster T. P. R. Co.*, 17 *B. Mon.*, 48); and however the interest of the witness might be regarded as affecting his credit, in this case the circuit court rightly overruled the exception to his deposition, and especially so, as he is shown to have been indemnified against loss, by the result of the suit, by the corporation of which he was a member.
2. It is essential to the existence of a pledge that the pledgee should have actual or constructive possession of the property pledged; but—
3. To constitute a valid lien by a pledge of property, it is not necessary that the legal title should be transferred as in case of a mortgage; on the contrary, the title generally remains in the pledgor. (2 *Parsons on Contracts, page* 113.)
4. Property *in transitu* may be pledged by the delivery of bills of lading therefor. Such delivery of the bills of lading is considered as a constructive or symbolical delivery of the property. A lien is created by such a pledge and delivery.
5. Shippers of cotton from Memphis, Tenn., to Boston, Mass., drew drafts upon their consignees, and discounted them in bank at Memphis, by pledging the cotton by a delivery of the bills of lading therefor; the cotton was subsequently attached *in transitu* at Louisville, Ky., by creditors of the shippers. *Held*—That the bank had a lien which had preference over the attachment liens.

I. & J. CALDWELL, and
BARNETT & EDWARDS, For Appellants,

CITED—

Civil Code, sec. 257.
3 *Dana*, 135; *Brummel vs. Stockton.*
1 *Duvall*, 28; *Robbins vs. Oldham.*

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1 *Parsons on Contracts*, 290, 606; 3 *Ib.*, 487, 342–4.
1 *Peters*, 475; *Conrad vs. Atlantic Ins. Co.*
Angell on Carriers, *sec.* 508.
2 *Head* (*Term R.*), 187; *Woodruff vs. Nash. and Chat. R. R.*
10 *Smead & Marsh* (*Miss. R.*); *Bonner vs. Marsh.*
1 *Term R.*, 205; *Caldwell vs. Ball.*
4 *Pickering* (*Mass. R.*), 205; *Stone vs. Swift.*
1 *Campbell*, 369; *Waring vs. Cox.*
7 *East.*, 249; *Rushforth vs. Hadfield.*
3 *Term R.*, 119; *Kimball vs. Craig.*
1 *Smith's Leading Cases*, 752; *Lickbarrow vs. Mason.*
2 *English*, 197; *Clark vs. Chipman.*
17 *Mass.*, 210; *Lainfair vs. Sumner.*
Story on Conflict of Laws, 76, 238.

J. B. KINKEAD, and
THOS. B. FAIRLEIGH, For Appellee,

CITED—

1 *Parsons on Shipping*, *pages* 134, 138, 140.
1 *Smith's Leading Cases*, 751; *Lickbarrow vs. Mason.*
Smith's Mercantile Law, *pages* 378–80, *and notes.*
3 *Kent*, *side page* 724, *note a.*
1 *Peters*, 637; *Conrad vs. Atlanta Ins. Co.*
2 *Kent*, *side page* 549, *note a*; *Ib.*, *page* 578.
12 *Pickering* 300–1; *Allen vs. Williams.*
2 *Wash. C. C.*, 283–89; *Walter vs. Ross.*
8 *Pick.*, 101; *Low vs. DeWolf.*
Civil Code, *secs.* 257, 675.
Story on Bailments, *sec.* 297.
1 *Metcalfe*, 405; *Short vs. Tinsley.*
6 *Dana*, 183; *Daniel vs. Morrison.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

A check drawn by Clark, Bigelow & Co. on the First National Bank of Memphis, Tennessee, payable to J. T.

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Petitt & Co., for two thousand nine hundred and twenty-nine dollars and seventy-six cents, dated the 29th day of October, 1866, having been protested for non-payment, said Petitt & Co. brought this suit against the drawers in the Louisville chancery court, and obtained an order of attachment against their property, which was levied, by the marshal of the court, on forty-six bales of cotton in the possession of the Louisville and Nashville Railroad Company, which had been shipped over said road by the Great Western All-rail Cotton Express by said Clark, Bigelow & Co. from Memphis, and consigned to Thayer, Bingham & Co., of Boston, Massachusetts.

The First National Bank of Memphis was, on its petition, made a party to the action, and claimed the cotton, or a lien thereon paramount to that acquired by the levy of the attachment, on the grounds that said Clark, Bigelow & Co., being the owners of said cotton, and desiring to obtain money on the faith thereof, had produced to said bank the bills of lading of said express company, showing that it had received the cotton and undertaken to transport it to said Thayer, Bingham & Co., together with a letter of said consignees, authorizing said Clark, Bigelow & Co. to draw on them for part of the value of the cotton, and deposited said bills of lading and letter of credit with the bank for the purpose of transferring the cotton to the bank; and that, on the faith and security thereof, said bank discounted and advanced to said Clark, Bigelow & Co. the proceeds of two bills of exchange drawn by them on their said consignees, one of them being for three thousand six hundred and fifty dollars and the other for two thousand three hundred dollars, which were protested for non-payment in consequence of the detention of the cotton under the levy of said attachment.

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To prevent loss or deterioration in the value of the cotton, the court ordered it to be sold during the pendency of the suit, and finally adjudged to the bank the entire proceeds of the sales, which were insufficient to pay the debt of the bank. From that judgment Petitt & Co. have appealed to this court.

The material facts alleged and relied upon by the bank were, we think, sufficiently proved; and although one of its principal witnesses, C. P. Norris, appears to have been largely interested as a stockholder in the bank, according to section 675 of the Civil Code he appears to have been a competent witness (*Covington and Lexington Railroad Company vs. Ingles*, 15 *B. Mon.*, 641; *Lackey vs. Richmond and Lancaster Turnpike Road Company*, 17 *B. Mon.*, 48); and however the interest of the witness might be regarded as affecting his credit, we think the court rightly overruled the exception to his deposition, and especially so, as he is shown to have been indemnified against loss, by the result of the suit, by the corporation of which he was a member.

The main and controlling question presented for our determination is, whether the deposit of the bills of lading with the bank without assignment or other writing, and without actual delivery of the cotton, was a sufficient transfer to pledge the cotton to the bank as security for the payment of the money they advanced to Clark, Bigelow & Co., on their drafts on Thayer, Bingham & Co., and upon the faith of the security so given.

The general principle, that where there is an absolute sale of personal property, capable of delivery, the possession must accompany the title, to render the sale effectual as to creditors, is well established; and it may be conceded that ordinarily, to create a valid lien on personal

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property by pledging it as security for a debt, a delivery of the property must be made..

Indeed, it is essential to the existence of a pledge that the pledgee should have actual or constructive possession of the property pledged.

But to constitute a valid lien by a pledge of property, it is not necessary that the legal title should be transferred as in the case of a mortgage; on the contrary, the title generally remains in the pledgor. (*Parson's on Contracts, vol.* 2, *page* 113.) The question is not, therefore, whether the deposit of the bills of lading was effectual to pass the legal title to the cotton, but whether it was a constructive or symbolic delivery of the cotton.

By the law merchant bills of lading are, to a certain extent, treated as negotiable instruments. In the hands of the original owner they generally represent his title to the property, at least until it comes to the possession of the consignee; and under certain circumstances the owner may, by his mere indorsement of a bill of lading, pass to a purchaser the absolute property for which it is given. Why may it not be used as the symbol of property for the purpose of making an effectual constructive delivery of the possession, as was intended by the deposit of the bills in this case?

In cases of gifts as well as ordinary sales of property, where it is inconvenient or impractical to make an actual delivery, it may be constructively made, and by such acts as the nature and situation of the property may require to effectuate the intention of the parties, as by delivering a part for the whole, or the key of a house in which the property is stored, or marking timber on a wharf or goods in a warehouse, or, if the property is in the hands of a bailee, by an order to him for the possession. (1 *Parsons, supra*, 530.)

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In this case, although the nature of the transaction does not import an absolute sale and transfer of the title to the property, nor more than the creation of a special property in the cotton as security for the money advanced by the bank, we are of the opinion that the deposit of the bills of lading was effectual for the latter purpose, and the lien so acquired by the bank was paramount to that created by the levy of the appellants' attachment, and the chancellor rightly so adjudged.

Wherefore, the judgment is affirmed.

CASE 5—PETITION EQUITY—DECEMBER 11.

Mundy vs. Mason, &c.

APPEAL FROM OWEN CIRCUIT COURT.

In 1864 a bond for two lots was assigned as collateral security, and in 1866 the assignor sold one of the lots to the assignee in payment of his debt, which was the full value of the lot. The sale of 1866 cannot be successfully assailed as fraudulent under the act of 1856, by creditors whose debts were created after the assignment of the bond. If any preference was given, it was given by the assignment of 1864.

E. W. HAWKINS, For Appellant.

H. P. MONTGOMERY and
LINDSEY & BROWN, For Appellees.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In the year 1864, Reuben H. Mundy, holding Thomas H. Berryman's bond for the legal title to two fractional

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lots in Owenton, Owen county, Kentucky, on one of which there was a livery-stable, and on the other a brick house, occupied by tenants, assigned the bond to his brother, Doctor J. F. Mundy, as collateral security for money advanced to his use and liabilities incurred as his surety; and in February, 1866, that bond being destroyed by guerrillas, R. H. Mundy sold to J. F. Mundy the brick house for two thousand five hundred dollars of the original consideration, and executed his bond for a title in apparent consummation of the first contract.

The appellees, who became creditors of R. H. Mundy since 1864, brought this suit in equity for subjecting the house and lot thus sold to sale and distribution under the act of 1856, against assignments "in contemplation of insolvency" made for preferring creditors.

The answers denied the imputed purpose, and averred that the transaction was a fair and valid sale.

But the circuit court decreed the subjection of that property as sought by the petition; and, on this appeal, we adjudge that decision erroneous.

The petition does not assail the contract of 1864, but tacitly admits its integrity and legal availability; and, moreover, the proof shows the correctness of its consideration, and, as subsequent creditors especially, the appellees cannot, therefore, complain of being injured by the last contract, which only partially effectuated the object of the first, of which they have not complained. The recited valuable consideration and the full payment of it have been sufficiently proved.

That consideration also seems to have been adequate; and all lien on the livery-stable and its lot was waived, and that property has since been sold for an unpaid balance due to Berryman as the original vendor.

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If, as may be probable, R. H. Mundy was unable to pay all his debts at the date of the last contract, we cannot see how that contract could be rightly adjudged to be within the range of the act of 1856, as an unlawful preference of a creditor who had been already lawfully preferred and amply secured by the unimpeached contract of 1864, and for which that of 1866, more advantageous apparently to creditors, was substituted.

But the petition also charges that the appellant holds the ostensible title to mules, wagon, and some other articles, in secret trust for R. H. Mundy, who enjoys the possession and use of them. The litigation on that subject was not decided by the circuit court, but may be considered as still pending.

We cannot, therefore, now say more respecting it than that, on the return of this case to the circuit court, this matter should be settled either as it now stands on the record, or on further preparation, if either party desire it.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings and decree according to this opinion.

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CASE 6—PETITION ORDINARY—DECEMBER 11.

Mundy vs. Robinson.

APPEAL FROM GALLATIN CIRCUIT COURT.

1. The hirer of a slave for a term which had not expired on the 18th day of December, 1865, when the Constitutional Amendment abolishing slavery was declared adopted, is entitled to an abatement, *pro tanto*, of the promised price.
2. Hiring implies a warranty of title; consequently, should the title fail from any legal cause, by either an eviction by superior title, or authorized act of the government, then there is so far, a failure of consideration, and the bailee or hirer will be entitled to a *pro tanto* abatement.

E. W. HAWKINS and
T. N. & D. W. LINDSEY, For Appellant,

CITED—

2 *Duvall*, 189; *Hughes vs. Todd.*
2 *Duvall*, 193; *Corbin vs. Marsh.*

STEVENSON & MYERS, For Appellee,

CITED—

1 *Bibb*, 536; 5 *Monroe*, 360–1; 2 *Duvall*, 190–1.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

August 7, 1865, E. W. Hawkins, with J. F. Mundy as his security, executed to J. T. Robinson the following note:

"$100. WARSAW, 7th August, 1865.

"One year after date we, or either of us, promise to pay Jno. T. Robinson or order, one hundred dollars, for value received, *for the hire of a negro woman named Martha for one year from this date*, and in addition agree to clothe

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and pay all physicians' bills during the year for said girl.

"E. W. HAWKINS,
"J. F. MUNDY."

As the amendment to the United States Constitution, abolishing slavery, was declared adopted and in force on December 18, 1865, and which this court has heretofore recognized as a part of the supreme fundamental law of the land, the hirer insists that he should be allowed an abatement of hire from the date of its adoption, but which the court below disallowed; and this is the only question presented for our revision.

In *Hughes vs. Todd* (2 *Duvall*, 189), this court held, that "the mere contract of hiring implies a contract for indemnity, if the hirer shall be evicted or *disturbed by any lawful intrusion* or eviction under a title paramount, or by the act or authority of the other contracting party;" but that "there is no implied guarantee of full and useful service the entire term, or for any portion of it. Consequently, the consideration being entire and only for the *title* to the service to the slave during the term, the sickness or death or escape of the hired negro will be no legal failure of consideration, total or partial, and the resulting loss must be borne by the hirer."

This is consistent and harmonious with the long recognized doctrine that, in sales of chattels or bailment thereof—and the hire of a slave is a limited sale for the term of the service—there is an implied warranty of title; consequently, should the title fail, from any legal cause, by either an eviction by superior title, or authorized act of the government, then there is so far a failure of consideration, and the tenant or bailee will be entitled to a *pro tanto* abatement.

Upon these principles the court was harmonious; but, as to whether the eviction was legal because the slave

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had availed himself of the privilege of volunteering in the army of the United States, by virtue of a congressional statute for such purpose, and which providing that he, his wife and children, should be free, the court was divided, the majority holding that such statute of Congress was unconstitutional and void, and, therefore, could authorize no legal interference with the hirer's right, or disturb the owner's legal right to his slave. But there is a broad difference between a mere act of Congress and a constitutional amendment.

The United States Constitution provides for its own amendment—how to be made and declared; whatever, therefore, we might as individuals think of the manner of the adoption of this Constitutional Amendment, it has been proclaimed by the proper authority as part of the supreme law of the land, accepted and acted on by all the departments of government, both State and Federal, and has been recognized by this court.

It necessarily and legally results, therefore, that from the day said amendment was proclaimed by the Secretary of State of the United States, as a part of the National Constitution, Robinson's right to said negro ceased, and she became a free woman, and was under no legal obligation to serve her former owner or his bailee; and Hawkin's right to claim further service from her, because of his contract with Robinson, also ceased; and, because of this legal failure of title, the hirer is entitled to an abatement of the promised price.

This we regard as the law from the mere act of hiring; but the language of this note makes it still stronger; for it expresses the continuing consideration for the hire of the negro "*for one year from this date.*"

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

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CASE 7—PETITION EQUITY—DECEMBER 11.

Bowen vs. Emmerson, &c.

APPEAL FROM OWEN CIRCUIT COURT.

A garnishee, being called on in plaintiff's petition *to answer and say what amount he is indebted to his co-defendant*, against whom the plaintiff had a return of "*no property*," the garnishee being served with a summons, and failing to answer, the petition is taken for confessed; and, on his allegation of indebtedness in a specified sum, the plaintiff is entitled to judgment for that amount against the garnishee. (*Civil Code, secs.* 248, 474.)

P. U. MAJOR and
H. P. MONTGOMERY, For Appellant,

CITED—

3 *Met.*, 171; *Smith, &c., vs. Gower.*
Civil Code, secs. 248, 474.

BERRYMAN, For Appellees.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This is an *action* in equity by appellees against True and appellant Bowen, as stated in the caption of the petition. In the subsequent parts thereof he is more than twice called a defendant; process was sued out against him, and actually served upon him, showing that it is emphatically a *suit* against him; and he is called on to answer and say in what amount he is indebted to his co-defendant, True, and although served with the summons, he fails to answer, and judgment was, upon the petition being taken for confessed, rendered against him

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for the smallest sum named as the amount of his indebtedness to True.

It is alleged in the petition that appellees had recovered a judgment against True, had sued out execution thereon, and had a return of "no property" by the proper officer. The averments in the petition were sufficient to reach the choses in action and other interests of True subject by statute to the payment of debts under section 474, Civil Code. Or it may be regarded as a proceeding under section 248, Civil Code, by which the proceeding will be regarded as *an action* against appellant as garnishee; and, upon the service of the summons, it would properly proceed as other actions, and the petition would then be taken for confessed, when no answer was put in by the garnishee, as is the fact in this case, and judgment be rendered against him for the sum alleged to be owing by him to his co-defendant, which the plaintiff would have a right to enforce by execution; so that the judgment was authorized in this as a proceeding under either section of the Civil Code quoted, and, consequently, must be affirmed.

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CASE 8—PETITION EQUITY—DECEMBER 11.

Ransdell, &c., vs. Threlkeld's adm'r.

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APPEAL FROM OWEN CIRCUIT COURT.

1. When an administrator fails to make a settlement, as required by law, in a suit against him by the heirs for a settlement and distribution, he is not entitled to a judgment for costs against them.
2. In a suit against them to subject assets descended to several heirs, it was error to render a joint judgment against them. The circuit court should have ascertained the amount each heir had received by descent, and a several judgment should have been rendered against each one for an amount not exceeding the amount so received, and not exceeding the amount to which the plaintiff was entitled. On the trial of this issue the heirs are personally responsible for the costs, when judgment is rendered against them.

GROVER & MONTGOMERY, For Appellants.

T. N. & D. W. LINDSEY, For Appellee.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

It was the right of appellants to have a settlement by the administrator of their father, of his accounts, and as he had failed to make the settlement as required by law, and to show what disposition he had made of the estate that came to his hands, they had a cause of action against him, and, so far as costs were incurred in settling that estate, they cannot be properly made to pay them. But to the extent that the administrator incurred costs in subjecting assets descended to appellants from their mother to the satisfaction of his demand against her, they are personally responsible; and for the costs

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that he was necessarily put to in prosecuting his cross-action against them therefor, he will be entitled to a judgment.

The report of the commissioner shows that the amount descended to the heirs from their mother was one hundred and ninety-two dollars; of this sum, each one of appellants was entitled to one eighth, which was ordered to be paid to each one respectively; but the judgment is against all the appellants jointly, for more than the sum descended to be distributed, and that was erroneous. The court should have ascertained what sum each one of appellants received by descent from their mother, and a several judgment should have been rendered against each one for the amount so received, not, however, to exceed the sum appellee may be entitled to.

Wherefore, for the errors named the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

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CASE 9—PETITION ORDINARY—DECEMBER 12.

Dyas vs. Lindsey.

APPEAL FROM GRANT CIRCUIT COURT.

SERVICE OF SUMMONS OUT OF THE COUNTY.—In an action in the Grant circuit court against one defendant only, the summons was served on him in Harrison county, and judgment by default was rendered against him on three notes. No special reason for such service appearing in the record, *on defendant's appeal, the judgment is reversed. Held—That*

If any of the special causes existed, authorizing the judgment, these should be manifested, else the circuit court should have refused to have pronounced judgment; and

The defendant, knowing that no such causes existed, was not required to respond to such service, but might regard it as totally insufficient to authorize a judgment against him.

To compel the attendance of the defendant, for the purpose of objecting, would be to expose him to the unnecessary trouble and expense of a litigation in a distant county, and reinstate the evils intended to be remedied by the Code; and

As the defendant had the right to appear in the circuit court and object to its further proceedings on such service, and had the right to appear in the Court of Appeals for the same purpose, he cannot be proceeded against because thereof; and unless some special cause for the service in Harrison county shall appear, or the appellant should waive his right to object, the circuit court should, on the return of this case, refuse to adjudge against him until proper service of process. (*Civil Code, secs.* 107, 110; *Randall vs. Shropshire*, 4 *Met.*, 327; *Raymond vs. Reed*, 16 *B. Mon.*, 350; *Ruby vs. Grace*, 2 *Duvall*, 540.)

E. H. SMITH, For Appellant,

CITED—

14 *B. Mon.*, 647.

8 *Ohio*, 215; *Sturgus vs. Burton.*

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2 *Met.*, 148–9; *Chile vs. Drake.*
Civil Code, secs. 107, 110.

JOHN L. SCOTT, For Appellee,

CITED—

14 *B. Mon.*, 647.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Upon a suit brought in the Grant circuit court by appellee against appellant alone, summons was served in Harrison county, and judgment by default rendered upon several notes. No special reason for such service appears in the record. The Civil Code, after specifying various cases of local jurisdiction, by section 106 provides that "every other action may be brought in any county in which the defendant, or one of several defendants, resides or is summoned," which embraces this case. Section 107 provides, that "where any action, embraced in the last section, is against *a single defendant, the plaintiff shall not be entitled to judgment against him on service of a summons in any other county than that in which the action is brought, unless he resided in that county at the commencement of the action, or, unless having appeared therein, he fails to object, before the trial, to its proceeding against him.*"

Section 110 provides, that "if, after the commencement of an action in the county of the defendant's residence, he removes therefrom, the service of the summons upon him in any other county shall have the same effect as if it had been made in the county from which he removed."

In *Raymond vs. Reed* (16 *B. Mon.*, 350), this court held, that when suit was properly brought in the Nicholas circuit court, where Raymond resided, and he being in attendance as a witness at the Bourbon circuit court, in

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which latter county the process was served, upon Raymond's objecting to judgment on such service, that it was unauthorized and erroneous, because it did not appear he had *removed*.

And in *Randall vs. Shropshire* (4 *Metcalfe*, 327), this court held, that where there were several defendants—but this was owing to a misjoinder of actions, as no cause of action affected all the parties—there a judgment by default, upon summons served in another county than where suit brought, was erroneous and unauthorized against the party so served.

And in *Ruby vs. Grace* (2 *Duvall*, 540), it was held that the service in a distant county to the one in which suit was brought against a single defendant, no removal of the defendant appearing, did not authorize a judgment by default, and that this was not merely a clerical misprision, but error cognizable in this court.

The provisions of these various sections of the Code clearly manifest that it was intended by the enacting power that no judgment should be rendered against a party other than in a county where he resided or where summoned, unless he had removed from said county after the bringing the suit; the language is, "*the plaintiff shall not be entitled to judgment* on such service *unless the defendant resided in such county* when the action was commenced.

A defendant, knowing either that he did not live in such county when the action was begun, or has not removed from it, and is not concealing himself from service of process, need not respond to such service, but may regard it as totally insufficient to authorize a judgment against him, and pay no attention thereto. If any of the special causes exist, authorizing said judgment, these should be manifested, else the court should refuse to pro-

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nounce judgment. To compel his attendance for the purpose of objecting would be to expose him to the unnecessary trouble and expense of a litigation in a distant county, and reinstate the evils intended to be remedied by these provisions of the Code.

As the judgment for this error must be reversed, we need not express an opinion as to the question made on the statute of limitations, as the appellant will have an opportunity to set up his defenses when he shall be properly summoned to appear. As he had the right to appear in the court below and object to its further proceeding on such service, and had the right to appear in this court for the same purpose, he cannot be proceeded against because thereof; and unless some special cause for the service in Harrison county shall appear, or the appellant shall waive his right to object, the court below should refuse to adjudge against him until proper service of process.

Wherefore, the judgment is reversed, with directions for further proceedings as herein indicated.

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CASE 10—PETITION ORDINARY—DECEMBER 12.

Long vs. Gaines, Berry & Co.

APPEAL FROM HENRY CIRCUIT COURT.

1. A failure to mention in the judgment, credits which are shown in the petition, is a clerical misprision, because the judgment could be amended by the record.
2. No appeal can be entertained to correct a clerical misprision, until a motion is made in the court below for that purpose. (*Dodd vs. Combs*, 3 *Met.*, 29.)
3. "Executed by delivering a true copy to John Long." On judgment by default, the Court of Appeals cannot presume that there were other John Longs in the county than the defendant. One John Long was the defendant; the writ was served on one John Long, and when he puts in no defense this court will presume he was the identical John Long sued.
4. A summons directed to the sheriff may be executed by a constable or other officer to whom it might have been directed, at the request of the plaintiff, as provided in the Civil Code (section 66), and the return thereon, of the constable or other officer, shall be proof of the time and manner of service (section 73). (*Boaz vs. Nail*, 2 *Met.*, 245.)

JOHN L. SCOTT, For Appellant,

CITED—

Civil Code, secs. 75, 66, 73.

2 *Met.*, 245; *Boaz vs. Nail.*

GEO. C. DRANE, For Appellees.

CITED—

Civil Code, secs. 73, 66.

2 *Met.*, 340; *Slone vs. Slone.*

3 *Met.*, 28; *Dodd vs. Comb.*

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CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The petition shows the credits for eighty dollars and fifty dollars not mentioned in the judgment. It was, therefore, a clerical misprision, because the judgment could be amended by the record, and no appeal for this correction can be entertained until motion in the court below for that purpose. (*Dodd vs. Combs*, 3 *Met.*, 29.)

The return of the officer is "executed August 24, 1868, by delivering a true copy of the within to John Long." On judgment by default, this court cannot presume that there were other John Longs in the county than the defendant. One John Long was the defendant, the writ was served on one John Long, and when he puts in no defense, this court will presume that he was the identical John Long sued; but more especially when he appears, as in this case, and moves the court to quash the return because it was made by an officer other than the one to whom it was directed.

A more serious question, however, is raised by this record—that is, as to the validity of the return, as the summons was directed to the sheriff and executed by a constable.

By section 66, Civil Code, it is provided, on actions brought in the circuit courts, that "the summons shall be directed to the sheriff of the county, or, *at the request of the plaintiff*, to the jailer, coroner, or *constable*."

Section 73 provides that the summons may be served by the officer to whom it is directed, *or by any officer to whom it might have been directed, whose return thereon shall be proof of the time and manner of the service.*

As was said by this court in *Boaz vs. Nail* (2 *Met.*, 245), "the effect of these provisions of the Code is to confer upon the plaintiff in an action the unlimited right to have

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his original process directed to and executed by either the sheriff, jailer, coroner, or a constable, at his own mere option."

By the second sub-division of section 73, the officer to whom process is directed, by indorsement on the summons, may authorize *any person* to serve it, whose affidavit shall be proof, &c.

It is evident that it was intended to make the return of the officers to whom it might have been directed evidence, instead of their affidavit. As they would be acting under official oath, their return should have the same weight as that of the sheriff.

The process being directed to the sheriff, it is presumed to have gone to his hands, and for some reason he handed it over to the constable to be served, which he had a clear legal right to do, either to one of the named officers or to a special bailiff. If the sheriff or plaintiff should hand the process to one of the officers named in section 66, no special authority need appear on the summons, nor affidavit of the manner of its execution, the return alone being sufficient evidence that it was in such officer's hands, and how he had served it; a great object being to facilitate the execution of process, and to simplify the evidence thereof.

We think the language aptly and clearly expresses the object of the Legislature, and means what it literally imports—that is, any officer to whom the process might have been directed may execute it, and his official return shall be sufficient evidence of the manner of its service.

Wherefore, the judgment is affirmed without damages, no supersedeas appearing.

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CASE 11—PETITION EQUITY—DECEMBER 12.

McBee vs. Myers, &c.

APPEAL FROM GRANT CIRCUIT COURT.

"I, Philip McBee, having consented to the above sale, will, at my death, give as much land to Walter McBee, as the vendee of my daughter Henrietta, as to any of the *balance* of my children. March 19, 1862."

By the above indorsement on his daughter's written contract of sale of her expectancy in his land, the father divested himself of the right of disposing of the designated portion of his land; and although he died intestate, the purchaser is entitled to an equal interest in his land by virtue of his said contract.

W. T. SIMMONS, For Appellant,

CITED—

2 *Metcalfe*, 476; *Wheeler's ex'r vs. Wheeler.*

GEO. C. DRANE, For Appellees,

CITED—

Civil Code, sec. 474.

Coke upon Littleton, 265; *Bacon's Abridgment, vol.* 2, *p.* 4.

2 *Met.*, 474; *Wheeler's ex'r vs. Wheeler.*

2 *Duvall*, 134; *Lee vs. Lee.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This action was brought by John Myers against Mrs. Henrietta Craig, to subject her alleged undivided interest in the real estate of her father, the late Philip McBee, to the satisfaction of a debt against her, which he had reduced to judgment.

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In her answer, Mrs. Craig disclaims any interest or right to any share in the estate of said decedent; and appellant, Walter McBee, claims to own her undivided interest in said real estate by virtue of a contract for the purchase of the same from her, in writing, bearing date 17th of March, 1862, which writing is filed as an exhibit, and which was executed with the consent, and in the presence of, the father of the parties to the contract or agreement, as is evidenced by a writing executed by him, as follows:

"I, Philip McBee, having consented to the above sale, will, at my death, give as much land to Walter McBee, as the vendee of my daughter Henrietta, as to any of the *balance* of my children. March 19, 1862."

After the institution of the action by Myers, Mrs. Craig conveyed her interest in said land to appellant, in execution of the contract between him and herself, her father having died intestate prior to the institution of the action aforesaid.

The circuit judge was of opinion that the sale and conveyance aforesaid from Mrs. Craig to appellant were void, adjudged the undivided one sixth of the land of which Philip McBee died seized, descended to his daughter, Mrs. Craig, and was subject to the payment of appellee's debt; and from which Walter McBee has appealed.

The recited consideration for the sale is not denied nor controverted, and, besides, there is evidence of the payment thereof; but, by the judgment of the court below, the interest sought to be sold by appellee for the satisfaction of his debt is ordered to be sold in disregard of the claim of appellant to have first refunded to him the consideration paid to Mrs. Craig by him for her interest.

In *Wheeler vs. Wheeler* (2 *Met.*, 474), to which we have been referred by the learned counsel for appellee, it is

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said: "It (referring to the contract) contains no covenant of warranty that operates as an estoppel against the appellee; and, in our opinion, it was properly disregarded by the chancellor, as presenting no obstacle to Charles Wheeler's claim, further than to require him to account for the consideration he had received, with interest."

If it be conceded that the contract relied upon by appellant was not enforceable, still, according to the principle recognized in the case cited, as equitable and just, appellant would be entitled to the sum advanced to Mrs. Craig, with interest from the date of the payment until he was let into the possession, before appellee's debt could be satisfied out of the proceeds; and for the payment thereof he would have a lien on the land prior and superior to that of appellee.

But it is insisted in support of the judgment, that the contract relied upon by appellant is of no effect and void, because the subject-matter of the contract at the time was not in *esse*, that it had neither an actual nor potential existence, but was a mere hope or contingency, founded upon no right and coupled with no interest, and, therefore, could not be the subject of a contract. This we recognize not only as the doctrine of the common law, but as being authoritatively settled by adjudications of this and other courts. Nor do we regard the principle settled in *Lee's executor vs. Lee, &c.* (2 *Duvall*, 134), as at all in conflict with this doctrine. In this case, after the contract for the sale of his supposed interest in his father's estate by James Lee to his brother, Samuel Lee, the father bound himself by a writing, obligatory and enforceable in consideration of said contract between his sons, and in consideration that Samuel had paid to James the sum of four hundred dollars therefor, to secure to his son Samuel the

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part of his estate which he had, by his will previously made, given to his son James, which was an equal share with his other children. This he covenanted to do by a codicil to his will. The father, by this writing, divested himself of the right to make any other disposition of the specified share in his estate than that stipulated for in the writing aforesaid; and there was then a right in being which could be properly the subject of a contract.

In *Wheeler vs. Wheeler*, *supra*, it is said that the father assented to the contract made by his sons, but did not divest himself of any right to the property, and conferred none upon the son who purchased; but retained the right to dispose of it as he pleased, without regard to his son's wishes or contract. In the one case the father, by a mere verbal assent to the agreement, parted with no right of disposing of the whole of his estate as he pleased; in the other, the father divested himself of that right as to the portion of his estate designated in the writing, by binding himself to secure it to the son named, which marks a broad and well-defined difference in the two cases.

The writing executed by appellant's father to him, in relation to the sale of Mrs. Craig's interest to him, is substantially the same as that executed by Samuel Lee, sr., to his son, in the case referred to *supra*, and the same legal effect must be given to it.

The disfavor which sales made by expectants has always received from courts grows out of the illusion and deceit imposed thereby on others not privy to the agreement; the father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark, the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and reformation. (1 *vol. Story Eq., s.* 334.)

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Wherefore, the judgment in the consolidated cases of *Myers vs. McBee, &c.*, and of *McBee vs. Myers, &c.*, is *reversed*, and the cause remanded, with directions to dismiss the petition of *Myers vs. McBee*, with costs; and in the case of *McBee vs. Myers*, a judgment be rendered that the plaintiff be permitted to hold the land in controversy, without molestation from appellant, and for further proceedings not inconsistent with this opinion.

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CASE 12—PETITION EQUITY—DECEMBER 14.

Crutcher vs. Hord and wife.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. At a decretal sale in Louisville, in 1862, of real estate belonging to parties then resident in the State of Mississippi, the purchaser, by announcing to competing bidders that he would purchase for the owner's benefit, prevented others from bidding, and was thereby enabled to bid it off himself at much less than its value, and much less than it would have then sold for. In 1864, the purchaser sold it for more than double the amount paid for it by him. After the cessation of hostilities, the original owners brought suit to recover the property from the sub-purchaser, and also against the decretal purchaser, if they could not recover the property itself, to compel him to pay over the amount received by him, deducting the purchase price, and for an account of rents and interest. *Held*—That the sub-vendee was entitled to hold as an innocent purchaser, but that the conduct of the decretal purchaser raised an implied trust, and he was responsible for the profits made by his purchase and sale, and also for rents and interest. (*Estell vs. Estell*, 3 *Bibb*, 179; *Partlow vs. Lane*, 3 *B. Mon.*, 426.)
2. Alien enemies may sustain the relation of debtor and creditor. If the debt existed prior to the war, only the right of action is suspended

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during hostilities, and revives with peace, unless the sovereign has intervened by way of confiscation; and even during the war, by the permit of the sovereign, this relation may be created, and it may be created by necessity without such license.

3. An alien enemy may be the devisee of real estate or the distributee or legatee of personalty; and if the government takes no proceedings of confiscation or sequestration, it will be no defense to his claim when such relation has ceased by the termination of the war. (*Fairfax vs. Hunter*, 7 *Cranch*, 626; *Attorney General vs. Wheeden, &c.*, *Park's Rep.*, 267; *Beadwell vs. Weeks*, 1 *Johns. Ch'y R.*, 206.)

4. In a proceeding to subject real estate situated in Kentucky belonging to enemies resident in the Confederate States during the war, the creditor being a citizen of, and the land situated in, Kentucky, so far from its sale being interdicted, the rights of the legal creditor are protected even against the government on a proceeding to confiscate, by section 47 of the act of Congress of March 3, 1863. (2 *Brightly's Digest*, 1238.)

5. Any one not under legal disabilities had the right to purchase the real estate situated in Kentucky of debtors who were resident in the Confederate States, at decretal sales thereof during the war, either for his own or for the debtor's benefit, subject, as was all the property of the rebel debtor, to confiscation by the government; but not subject to be defeated in this or any other right by any one except the sovereign.

6. Legal rights and responsibilities might spring out of the conduct of the purchaser of such real estate, which, however, would remain suspended during hostilities; but on the restoration of peace, the debtor's right of action would revive, and he could enforce any legal right which existed anterior to, or was created during, the war.

W. R. Thompson and
Barret & Roberts, For Appellant,

CITED—

1 *Bibb*, 609; *Snelling vs. Utterback.*
4 *J. J. M.*, 593; *Letcher vs. Letcher.*
1 *Mar.*, 51; *Anderson vs. Bacon.*
1 *Mar.*, 231; *Owings vs. McLain.*
3 *B. Mon.*, 426; *Purtlow vs. Lane.*
Rev. Stat., secs. 20, 21, 22, *chap.* 80, 2 *Stanton*, 230.

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6 *Dana*, 331; *Graves vs. Dungan.*
Lawrence's Wheaton, 556, 521, *and note* 171.
2 *Story's Equity*, *sec.* 1201 *et seq. b.*
2 *Wallace*, 419.
Washburn on Real Property, *s. p.* 176, *sec.* 17.
1 *Kent's Com.*, *p.* 74, *sec.* 66.
8 *Cranch*, 155; 5 *Johnson's Ch'y R.*, 19.
16 *Johnson's R.*, 438; *Griswold vs. Waddington.*
2 *Black's U. S. S. C.*, 665.
3 *Mar.*, 56–7; *Fowke, &c., vs. Slaughter.*
Hill on Trustees, *p.* 70.
6 *Ves.*, 739; *Curtis vs. Perry.*

BODLEY & SIMRALL and
BULLOCK & ANDERSON, For Appellees,

CITED—

Story's Equity, *secs.* 1265, 252, 256, 293, 330.
Hill on Trustees, *pp.* 144, 170, 165.
Revised Statutes, *secs.* 20, 21, 22, 2 *Stanton*, 230.
3 *Met.*, 168; *Graves vs. Graves.*
Act of Congress July 13, 1861, *Brightly's Digest*, 1231.
U. S. Statutes at Large, *vol.* 12, *p.* 1262.
Lawrence's Wheaton, 556, 558, *and note* 175.
6 *Taunton*, 237.
7 *Cranch*, 626; *Fairfax vs. Hunter.*
2 *Vattel*, *ch.* 8, *pp.* 112, 114.
2 *Grotius*, *ch.* 6, *p.* 16; 1 *Johnson's Ch'y R.*, 206.
2 *Bush*, 298; *Leathers vs. Com. Ins. Co.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

April 14, 1862, by virtue of a decretal order of the Louisville chancery court, the house and sixteen acres of land of appellees, near the city of Louisville, was sold to pay a remainder of purchase price, at which sale

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Crutcher became the purchaser, at the price of seven thousand and fifty-seven dollars and sixty cents. Hord and wife then resided in the State of Mississippi, and were not in Kentucky.

It is abundantly established, that at this sale there were numerous persons, several of whom desired to purchase the property, most, if not all, of whom were prevented from bidding, because Crutcher publicly announced that he was purchasing, or intended to purchase, the property for the owners; and the amount to be raised having been bid for the twenty-five acres, the proposition was then made by the marshal executing the order of sale, who would pay the debt for the least number of acres, when some one bid a less number, which drew from Crutcher the remark, in a manner indicating his displeasure, that it mattered not to him how little he got, as he would purchase it for the owner's benefit; and the bidder being admonished by another person that he was only injuring the owner, ceased bidding. Also, that Crutcher had agreed with the agent of Hord and wife, who had acted for them before the late war broke out, to purchase this property for their benefit.

The property bought was, at the time, worth from ten to fifteen thousand dollars. The house was commodious and comfortable, and the place a desirable residence, and which, February 12, 1864—less than two years afterwards—he sold at fifteen thousand dollars. The rents were proven to be worth from five hundred dollars to seven hundred dollars per annum during the war, and one thousand dollars afterwards.

After the cessation of hostilities and the restoration of peace, Hord and wife brought this suit to obtain the property on the payment of the price paid by Crutcher, and seeking a settlement of rents and interest; but if

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this could not be done, then that Crutcher should be compelled to pay over the amount received by him, deducting the purchase price, and for an account of rents and interest.

The court below dismissed the petition as to the purchaser, Alexander, who was Crutcher's vendee, regarding him as an innocent sub-purchaser, which this court affirmed. On a subsequent hearing, after submitting the matters in dispute between Crutcher and Hord and wife to a master and his report, the court adjudged against Crutcher nine thousand seven hundred and ninety-nine dollars, with interest thereon from November 22, 1867, being the amount ascertained by the master as due October 14, 1867, from which Crutcher prosecutes this appeal.

He now insists that there was no relation of trustee existing on his part towards Hord and wife; that he purchased and paid for said property with his own means; that he resided in Kentucky and they in Mississippi; that the late war was then flagrant, and they stood in the relation of alien enemies to him; that there was no express, and could legally be neither an express nor implied, trust between him and them. As the war terminated the agency of the Kentucky agent of Hord and wife, it may, perhaps, be legally said that there was no express trust; but still, does not the conduct of Crutcher raise an implied trust for which he can be held responsible?

In *Estell vs. Estell* (3 *Bibb*, 179), this court held, as far back as 1813, that the purchase of property under execution for the benefit of the debtor, at the instance of his wife, or, if not so made, *he was guilty of a fraud by having the advertisement of the sale taken down*, by which means but few persons attended the sale and the property sold

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for much less than its value. "Whether, therefore, Ben Estell purchased the negroes for the use of Sam. Estell, or was guilty of a fraud in procuring the sale and purchase for his own benefit, in either point of view he has not acquired an absolute property in the negroes, and Sam. Estell is entitled to relief."

In *Partlow vs. Lane* (3 *B. Mon.*, 426), on bill by Lane, as a former partner and creditor of Chambers, to subject lands charged to be held in trust by Partlow for him, sold and purchased at execution sale, Partlow admitted in his answer, "that on the day of sale Chambers remarked, that, as his land had to be sold, he would prefer respondent's purchasing it to any one else, as he would have some chance of getting it back, *to which respondent made no reply;*" and that there was no other understanding between them. It appeared, however, says the court, that Chambers, relying on this implied agreement, represented to some of the bidders that Partlow was buying the land in for him, and requested them not to bid, and that some of the bidders were thus deterred, and that Partlow by this means obtained the land at a lower price than he would otherwise have done; and that, after the sale, he said, when he purchased the land he bought it in for Chambers, and did not then expect to pay for it himself.

The court, after showing that such an agreement does not of itself constitute a ground for avoiding the sale even by creditors, nor that the so obtaining the land at a reduced price brought it within the operation of the statute against fraudulent conveyances, and render it absolutely void as to creditors, yet they did consider Partlow "as having acquired the legal title by the sheriff's deed * * at a grossly inadequate price, occasioned in part, at least, by his agreement for the benefit of Chambers,

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and by the improper conduct of Chambers caused by that agreement, and perhaps impliedly authorized by it, we are of opinion *there was so much unfairness in the sale as that Partlow cannot conscientiously retain the land* against the creditors of Chambers. * * *His doing so would itself be a fraud.*"

If the tearing down an advertisement, and the permitting a defendant to say to the persons present that the purchaser was buying for his benefit, should be regarded as being so far fraudulent as to make the purchaser a trustee, and hold the property for the use of the execution debtor or his creditors, much more so should it be when the purchaser himself, for the very purpose and with the effect of deterring other bidders, proclaims that he is so purchasing the property, and especially when he gets it at greatly less than it would then have sold for, as was the case in this instance.

The only remaining question is, whether the relative situation of the parties, at the time of purchase, forbids this relation of trustee and beneficiary? Commercial intercourse was then prohibited, by the enactments of Congress and the proclamation of the President, between the citizens of Kentucky and Mississippi, and for many purposes they sustained the relation of alien enemies; yet even alien enemies have many rights as to each other, and in many instances the individual may not interpose when the government can.

Alien enemies may sustain the relation of debtor and creditor. If the debt existed prior to the war, only the right of action is suspended during hostilities, and revives with peace, unless the sovereign has intervened by way of confiscation; and even during the war, by the permit of the sovereign, this relation may be created, and it may also be created by necessity, without such license. An

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alien enemy may be the devisee of real estate or the distributee or legatee of personalty; and if the Government takes no proceedings of confiscation or sequestration, it will be no defense to their claim when such relation has ceased by the termination of the war; and other rights might be named.

In *Fairfax vs. Hunter* (7 *Cranch*, 626), the Supreme Court of the United States held, that a devise to Dennis Fairfax, a resident of England, and an alien enemy, by a testator who died in Virginia during the war, of lands in Virginia, was not void. Justice Story, in the opinion, after stating that an alien may take by purchase and hold real estate until office found by the Government, said: "The alien has complete dominion over the same; he is a good tenant of the freehold in a *præcipe* on a common recovery, and may convey the same to a purchaser. * * We do not find that, in respect to these general rights and disabilities, *there is any admitted difference between alien friends and alien enemies*. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended; but as to capacity to purchase, no case has been cited in which it has been denied; and in the *Attorney General vs. Wheeden, &c.* (*Park's Rep.*, 267), it was adjudged that a bequest to an alien enemy was good, and after peace might be enforced. Indeed, the common law in these particulars seems to coincide with the *jus gentium*."

And in *Beadwell vs. Weeks* (1 *Johnson's Chy. R.*, 206), Chancellor Kent held, that a citizen and resident of England, who was an alien enemy, may take personalty as distributee, of one dying here during the war of 1812; and ordered the administrator to hold the funds until the war ceased, and denied the claims of the next of kin,

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residing in this country, saying that the laws of war "impose no forfeiture or confiscation of property. They destroy no right, but only suspend the exercise of certain rights. *It is for the sovereign power * * * to determine* when and how far, in cases unprovided for by treaty, the rights and property of alien enemies shall be imperiled by war." It is true the Senate of New York, by the casting vote of its presiding officer, reversed this case; but all the judges were for affirmance, therefore it has the authority not only of Kent's great name, but that of all the judges who sat upon the case.

How infinitely stronger is the case under advisement. Here the parties are citizens of the same great Republic, but of different States, then unexpectedly at war; but many constitutional rights pertain to both alike.

This was a proceeding in a Kentucky court in behalf of her citizen, against a non-resident, but a citizen of the United States, to compel him to pay a debt. It was his legal duty to pay it, else the judgment of sale was wrong. The creditor had a lien upon and a legal right to sell the property, else the judgment and sale were erroneous. If the creditor had a right to demand his debt, the debtor had the right to discharge it, else there would be the solecism of a right in the creditor to demand, but no right in the debtor to pay the debt. If the debtor had violated no legal right of his creditor by withholding the debt, there would have been no cause of action. If the creditor had the legal right to have the property sold to pay the debt, the debtor had the legal right to sell it for such purpose, for he certainly could voluntarily do what the court, by suit, could legally compel him to do.

The creditor being a citizen of, and the land situated in, Kentucky, so far from its sale being interdicted, the

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rights of the legal creditor are protected even against the government, on a proceeding to confiscate, by the 47th section of the act of Congress of March 3, 1863 (2 *Brightly's Digest*, 1238).

That law that secured the right to the creditor to demand his debt, gave also necessarily the right to the debtor to pay it. The law that authorized the creditor and the court to sell the land to pay the debt, necessarily authorized the debtor to do so for the same purpose.

If the creditor had the legal right to demand the debt and the debtor had the right to pay it, his agent, friend, or trustee would have the same legal right; and if both creditor and debtor had such right, any one, not under legal disabilities, had the right to purchase either for his own or the debtor's benefit, subject, however, as was all other property of the rebel debtor, to confiscation by the government, but not subject to be defeated in this or any other right by any one but the sovereign. The alien enemy, if the appellees be such, could legally hold the land against all the world but the sovereign and right of sale in his lawful creditors; much more so could a rebel citizen of that sovereign; and legal rights and responsibilities might spring out of the conduct of a purchaser of his property, which, however, would remain suspended during hostilities, as the alien enemy or rebel citizen would have no such status as to authorize a suit by him in our courts. But, on the restoration of peace, his right of action would revive, and he could enforce any legal right which existed anterior to, or was created during, the war.

Wherefore, the judgment is affirmed, without damages, no supersedeas appearing in the case.

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CASE 13—PETITION EQUITY—DECEMBER 15.

Gardner and wife vs. Craddock, &c.

APPEAL FROM HART CIRCUIT COURT.

In a petition to sell the lands of heirs, any one of whom is an infant, or of unsound mind, a married woman, or resides out of the State, under article 1, chapter 86, of the Revised Statutes, *the authority of the court to adjudge the sale depends on the existence of the particular facts named in the statute. It is necessary to allege, and prove, that the share of each heir, is not of greater value than one hundred dollars.* For the want of such proof in this case, the judgment of sale is reversed on the appeal of one of the heirs, a married defendant, to the petition.

ROBERT D. MURRAY, For. Appellants,

CITED—

Revised Statutes, chap. 86.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

This was a suit in equity by part of the heirs of Philip Wells, deceased, against the appellants and others, who were also heirs of said decedent, seeking a sale of three parcels of land which descended from said decedent, under article 1 of chapter 86 of the Revised Statutes, the petition alleging that one of the heirs was an infant, and others, who were made defendants, were married women and non-residents of the State, and that the share of each heir in the lands was not of greater value than one hundred dollars.

The appellants, Robert Gardner and wife, were made defendants to the action, and served with process, but did not answer the petition; and they now seek a reversal

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of the judgment which subjected their interest in the land to sale.

Said article 1 of chapter 86 of the Revised Statutes provides, "that whensoever any land shall descend to two or more heirs, any one of whom is an infant, or of unsound mind, a married woman, or resides out of the State, and the share of each heir is not of greater value than one hundred dollars, the court of equity for the county in which the land, or the greater part thereof, lies, may, on the petition of one or more of the heirs, decree a sale of the same."

The authority of the court to adjudge the sale of the female appellant's share of the land, according to the above enactment, depended on the existence of the particular facts named in the statute, one of which being, that the share of each heir was not of greater value than one hundred dollars; and these essential facts should not only have been alleged, but proved, to authorize the court in this proceeding to divest the parties of title who were either married women or infants. But although the facts are substantially alleged, they are not established by any competent evidence.

The judgment directing the sales is, therefore, reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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CASE 14—PETITION ORDINARY—DECEMBER 15.

Groom's adm'r vs. Pickett, &c.

APPEAL FROM CLINTON CIRCUIT COURT.

The court, whence an execution issued, which was directed to the sheriff of another county, has no jurisdiction of an action against such sheriff for his failure to make levy and return of such execution as required by law. The cause of action occurred in the county of which the defendant was sheriff, and the courts of that county have jurisdiction. (*Civil Code, sec.* 94.) *Sections* 3 *and* 4, *article* 18, *chapter* 36, *Revised Statutes* (1 *Stanton* 493), giving jurisdiction in such cases to the courts whence the executions issued, are repealed by the provisions of the Code which were subsequently adopted. (*See Civil Code, secs.* 748, 875, *and* 908.)

J. A. BRENTS and
A. J. JAMES, For Appellant,

CITED—

Revised Statutes, secs. 3, 4, *art.* 18, *chap.* 36, 1 *Stanton,* 493.
Civil Code, secs. 94, 587; *also* 1 *Stant.*, 177.
Session Acts, 1853–4, *pp.* 24 *to* 56.
3 *Met.*, 324–5–6.
Act of Feb. 12, 1858, 2 *Stanton*, 513.
2 *Met.*, 500–1–2.
1 *Bush*, 384; *Bank of Ky. vs. Harrison, &c.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This action was brought by appellant in the *Clinton circuit court* against appellee, Pickett, late sheriff of *Adair county*, and his sureties on the official bond of said Pickett.

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The petition contains two paragraphs. In the first it is alleged that appellant caused an execution to issue from the Clinton circuit court clerk's office in his favor, against the estate of J. A. Morrison, &c., on the 14th of May, 1867, on a sale bond for one thousand five hundred dollars, directed to the sheriff of Adair county, the same in which the defendants therein then resided, which was placed in the hands of said sheriff on the 16th day of the same month; that the defendants in said execution then and there had sufficient estate unencumbered to satisfy the said execution, known to said sheriff, but that he failed and refused to levy said execution on the estate of the defendants and to make his debt, and seeks a judgment therefor against the sheriff and his sureties.

In the second paragraph he alleges that he caused a second execution to issue for said debt against the estate of said Morrison and others in July, 1867, which was in due time placed in the hands of Pickett, sheriff of Adair county, the same county in which the defendants in said execution then resided; and said sheriff wholly failed to levy and collect the amount thereof, although said defendants had estate unencumbered in said county, and subject to levy and sale, sufficient to satisfy his debt; and he also alleges that said sheriff failed and neglected to return said execution to the office whence it issued; and he seeks judgment for his debt, and thirty per cent. damages against said sheriff and his sureties for the failure to make his debt, and for failing to return the execution; and having failed in the court below, he has appealed to this court.

A plea to the jurisdiction of the Clinton circuit court was filed by appellees, and that is the vital question in the case.

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In the *Bank of Kentucky vs. Harrison, &c.* (1 *Bush*, 384), this question is settled adverse to appellant; but he insists that sections 3 and 4, article 18, chapter 36, Revised Statutes (1*st vol.*, *p.* 493), had escaped the attention of the court, wherein it is expressly provided, that the remedy for the delinquency here complained of shall be by motion or suit in the court whence the execution issued. This provision of the statute, if unrepealed, would certainly confer jurisdiction on the court whence the execution issued to enforce the remedy against the sheriff.

By sub-sections 2 and 3 of section 94, Civil Code, it is provided, that actions against public officers for an act done by them in virtue or under color of their office, or for a neglect of official duty, and an action upon the official bond of a public officer, must be brought in the county where the cause, or some part thereof, arose.

The action was brought on the official bond of the sheriff, and the neglect of official duty by the sheriff is shown to have occurred in Adair county, where the defendants in the execution resided; their estates were in that county, as alleged, and the sheriff had no lawful authority to levy said execution on any estate out of that county, if any could have been found outside of its limits. It only remains to ascertain whether the provision of the Revised Statutes, *supra*, has been superseded by the *Civil Code*.

By section 875, Civil Code, it is provided, that all statutes and laws heretofore in force in this State, in any case provided for by this Code, or inconsistent with its provisions, are hereby repealed and abrogated, &c.

The *section of the Revised Statutes* relied upon as giving the Clinton circuit court jurisdiction, was repealed by the section of the Civil Code just quoted; and it results that said court improperly took jurisdiction in the case.

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Whatever errors, therefore, may have intervened in the progress of the trial, cannot be available for reversal. As appellant's cause of action was restricted to Adair county, no judgment could have been properly rendered in Clinton county therefor, as a plea to the jurisdiction of that court was filed and relied upon.

Wherefore, the judgment is affirmed.

CASE 15—MOTION—DECEMBER 16.

4b 375
99 108
4bu 375
el12 738

Bartly vs. Fraine, &c.

APPEAL FROM MONROE COUNTY COURT.

1. On sufficient notice and motion, the sureties in a sheriff's official bond moved the county court for additional security, "in consequence of official default." After hearing the parties the court required additional security in a prescribed time, and the sheriff failing to give it, was, by order of the court, removed from office, and a successor was appointed and qualified. *The judgment of removal is affirmed.*
2. County courts have constitutional power to remove sheriffs from office for failing to give new bonds at the time prescribed by the court, in a proceeding by notice and motion of sureties as authorized by law. (*State Constitution, sec.* 9, *art.* 6, *and sec.* 19, *art.* 8, *and sec.* 2, *chap.* 97; *Revised Statutes*, 2 *Stanton*, 396–7.)
3. The discretionary power conceded by section 9, article 6, and section 19, article 8, of the Constitution, is plenary and unqualified, and thus the organic law itself, considered in all its provisions on this subject, is *consistent with the power to remove a sheriff for the security of his sureties*, even when the cause for removal may be an impeachable or indictable matter, and more especially when it is not, as in cases of some unimpeachable delinquency or apprehended insolvency, not indictable.

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4. Section 2, chapter 97, of the Revised Statutes (2 *Stanton*, 396–7), authorizing county courts to remove sheriffs from office for failing to give a new bond on the day prescribed by the court, is constitutional.
5. The removal of officers on conviction by indictment or impeachment, as provided in section 36, article 4, and in article 5, of the Constitution, *is for the public benefit;* the removals authorized by section 19, article 8, are for the benefit of sureties. In the case of *Lowe vs. Commonwealth* (3 *Met.*, 237), the jailer was removed by the county court for an act for which he might have been removed by indictment or impeachment, and the removal was for the public benefit, and not for the relief of sureties; hence the removal in that case was held to be unauthorized by the Constitution.

LEWIS & COCKRILL, For Appellant,

CITED—

3 *Met.*, 237; *Lowe vs. Commonwealth.*

LESLIE & BOTTS, For Appellees,

CITED—

Revised Statutes, secs. 1, 2, *chap.* 97, 2 *Stanton*, 396.
13 *B. Mon.*, 393; *Lemmon vs. Peck.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On sufficient notice the appellees, as sureties in his official bond as sheriff of Monroe county, moved the county court of that county for additional security, "in consequence of official *default*." After hearing the parties, the court required additional security in a prescribed time, and the appellant failing to give it, was, by order of court, removed from office, and a successor was appointed and qualified for the unexpired term.

As the record exhibts none of the evidence heard on the trial, we must presume that it authorized the requisition made by the court.

But the appellant insists that the county court had no constitutional power to remove him from office, and in support of that position he relies on section 36 of article

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4 of the State Constitution, subjecting sheriffs and other civil officers to indictment for "*malfeasance* or *misfeasance* in office," and on article 5, concerning impeachment of all civil officers; and also on the opinion of this court in the case of *Lowe vs. The Commonwealth* (3 *Met.*, 237).

It neither appears nor should be presumed that the imputed "default" in this case was either an impeachable or indictable offense, and, therefore, the principle of the decision in 3d Metcalfe is not applicable here. But however this may be, there are other provisions in the Constitution which authorized the relief of the sheriff's sureties by his removal from office, *their only alternative remedy* after his refusal to give the required bonds. An impeachment or indictment is for the benefit of the public; a removal on motion by sureties is for their own exclusive benefit; and, unless the Constitution and the statutory law authorize such relief to sureties, they might be deemed without remedy, and there would be an inexcusable defect in our jurisprudence. There is no such defect in either the fundamental or statutory law of Kentucky.

Section 9th of article 6th of the Constitution authorizes the proper tribunals to require sheriffs and some other officers to give bond "as often as may be deemed necessary."

And section 19th of article 8th provides, that "the General Assembly *shall* direct by law how persons who now are, or who may hereafter become, securities for public officers, may be relieved or discharged on account of such securityship."

And section 2d of chapter 97, pages 396–7, Stanton's Revised Statutes, provides, that if a sheriff or other officer shall fail, when required to give a new bond, "he *shall*, by order of the court, be *removed from his office*."

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The discretionary power conceded by these two provisions of the Constitution is plenary and unqualified; and thus the organic law itself, considered in all its provisions on this subject, is consistent with the power to remove a sheriff *for the security of his sureties*, even when the cause for removal may be an impeachable or indictable matter; and more especially when it is not, as in cases of some unimpeachable delinquency or apprehended insolvency, not indictable; and, consequently, the statute before cited, and conformably with which the county court acted in this case, is constitutional and authoritative.

In the case of *Lowe vs. The Commonwealth*, the removal of the jailer was for an act for which the court said that he might have been removed by impeachment or indictment, as prescribed by the Constitution; and the removal by the county court was for the public benefit, and not for the relief of sureties.

As the jailer's tenure of office was fixed by the Constitution, subject to curtailment by no other judicial proceeding for the Commonwealth than impeachment or indictment, the opinion in the case of *Lowe vs. The Commonwealth* was, in effect, hypothetically right, though the reasoning of the court is so indiscriminating as to seem to embrace this case, and, so far, it was unintentional and ultra-judicial.

There is no judicial conflict between that case and this. But however that may be, we are satisfied with our conclusion in this case as right and unaffected by any opposing authority.

Wherefore, the judgment is affirmed.

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CASE 16—PETITION EQUITY—DECEMBER 16.

Pryor, assignee, &c., vs. Smith, &c.

46 379
88 71

APPEAL FROM HENRY CIRCUIT COURT.

1. Husband and wife conveyed thirty-two acres of her land in part pay for three hundred and forty acres which he purchased, and which was conveyed to the husband. Before the wife agreed to join in the conveyance of her land, her husband agreed, verbally, that he would indemnify her in the three hundred and forty acres, and she was also advised that he would hold the land conveyed to him in trust for her to the extent of the price of her thirty-two acres. *Held by the court*—That, as the deeds contained no reservation in her favor, one of them divested her of her title, and the other vested in her husband the land he purchased in part with it. These transactions constituted a complete conversion and reduction of her estate in the land by her husband to his possession, and generally when this is done a court of equity will not interpose to provide for the wife to the exclusion of the claims of creditors, and also that no trust resulted in favor of the wife. (*Whitesides vs. Dorris and wife*, 7 *Dana*, 108; *Martin vs. Trigg*, 8 *B. Mon.*, 529; *Latimer vs. Glenn*, 2 *Bush*, 543; *Revised Statutes*, *section* 22, *chapter* 80; 2 *Stanton*, 230.)
2. The homestead exemption, provided for by act of February 10, 1866 (*Myers' Sup.*, 714), does not apply to debts or liabilities created or incurred before the 1st day of June, 1866. It does not apply to a note executed after that date, as a renewal of a note given before that date. The renewal of a note is not a satisfaction of a debt, but only a change of the evidence of it. (*Lowry vs. Fisher*, 2 *Bush*, 70.)
3. An order appointing a commissioner to ascertain facts in reference to alleged usury in controversy in the suit, is not such a final judgment as will authorize an appeal.

S. E. DeHaven and
A. J. James, For Appellant,

CITED—

8 *B. Mon.*, 326; *McCann vs. Letcher.*
11 *B. Mon.*, 285; *Hunt's adm'r vs. Dupuy.*

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2 *Bush*, 540; *Latimer vs. Glenn.*
4 *Bush*, 168; *Worley vs. Tuggle, &c.*

JOHN RODMAN, For Appellees,

CITED—

4 *Met.*, 86; *Maramon vs. Maramon.*
10 *B. Mon.*, 245; *Brooks vs. Turpin.*
8 *B. Mon.*, 529; *Martin vs. Trigg.*
1 *Vesey, jr.*, 173.
2 *Dana*, 114; *Tilford vs. Bank of Kentucky.*
6 *Mon.*, 89; *Morrison vs. Taylor.*
2 *Met.*, 93; *Chinn vs. Mitchell.*
Civil Code, sec. 748.
10 *B. Mon.*, 282; *Muir vs. Cross.*
3 *Met.*, 274; *Ross vs. Ross.*
1 *Duvall*, 321; *Moss vs. Rowland.*
2 *Duvall*, 155; *Scott vs. Shepherd.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

On the first day of June, 1858, Z. F. Smith and wife, and Mildred D. Smith, sold and conveyed to Augustine Dupuy a tract of land containing about three hundred and forty acres, for the price of seventeen thousand and twenty-eight dollars and twenty-five cents, the receipt of which they acknowledged in their deed. It appears, however, that one thousand six hundred and two dollars and fifty cents of said consideration was not paid in money, but by the simultaneous sale and conveyance to Z. F. Smith, by Dupuy and his wife, Lucy Jane Dupuy, of a tract of about thirty-two acres of land, which said Lucy Jane owned by inheritance from her deceased father. It also sufficiently appears, that, at the time of these sales and conveyances, said Lucy Jane Dupuy objected to conveying her title, except upon the condition that the value of the thirty-two acres should be secured

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to her in the larger tract conveyed to her husband; but she did so on the verbal agreement of her husband that he would so indemnify her, and under advice that the deed to A. Dupuy would vest the land in him, in trust for her, to the extent of one thousand six hundred and two dollars and fifty cents of the consideration.

On the 24th day of August, 1867, said A. Dupuy being largely involved in debt, made a deed of assignment to W. S. Pryor, in trust for the use of his creditors, of said tract of three hundred and forty acres of land, and all his other property not exempt from execution.

Pryor, having sold the land as directed by the deed of assignment, brought this suit for the decision of certain questions which it was necessary to have judicially determined before he could, with safety to himself, make distribution of the assets in his hands among the creditors of Dupuy; and, by the cross-pleadings in this suit, the following matters were litigated:

1st. On the cross-petition of said Lucy Jane Dupuy, she sought to have an equitable provision made for her in consideration of her conveyance of the tract of thirty-two acres of land to Smith, and Smith and other creditors controverted her claim.

2d. A. Dupuy set up a claim to a homestead right in the land under the act of February 10th, 1866. (*Myers' Supplement*, 714.)

3d. He sought to have a claim of Drane, Smith & Co., for a judgment against him for ten thousand three hundred and sixteen dollars and twenty cents, abated by fifteen hundred dollars, for alleged usury in the debt.

The court rendered a judgment in bar of the claim of said Lucy Jane Dupuy, and also of A. Dupuy's claim under the homestead exemption law; and from those

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adjudications Dupuy and wife have appealed to this court. As to the claim of usury, the court expressed the opinion that part or all of it should be allowed, and directed certain facts concerning it to be ascertained by a commissioner; and from this order the claimants of said debt prosecute a cross-appeal. But as we did not regard the order as a final judgment, the cross-appeal will be dismissed for want of jurisdiction in this court.

The claim of Mrs. Dupuy was, in our opinion, properly rejected. The deeds contained no reservation in her favor. One of them divested her of her title, and the other vested in her husband the land which he purchased in part with it. These transactions constituted a complete conversion and reduction of her estate in the land by her husband to his possession; and generally, where this is done, a court of equity will not interpose to provide for the wife to the exclusion of the claims of creditors. (*Whitesides vs. Dorris and wife*, 7 *Dana*, 108; *Martin vs. Trigg*, 8 *B. Mon.*, 529; *Latimer vs. Glenn*, 2 *Bush*, 543; *and Watson vs. Robertson, decided at the last term.*)

It is insisted, however, that the deed to A. Dupuy vested the title in him, so far as purchased with the thirty-two acre tract of land, in trust for his wife; but by section 22 of chapter 80 of the Revised Statutes (2 *vol.*, 230) it is declared, that "when a deed shall be made to one person, and the consideration paid by another, no use of trust shall result in favor of the latter." And although this provision of the statute is by a subsequent one restricted in its application, the facts show the conveyance in this case to be embraced by it.

We also concur in the conclusion of the circuit court, that, as to said debt of Drane, Smith & Co., A. Dupuy

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was not entitled to the benefit of said act of February 10, 1866. The homestead exemption provided by that act is restricted to debts incurred after the first day of June, 1866; and although the debt of Drane, Smith & Co. was evidenced by a note executed to Smith, dated the first day of January, 1867, it indisputably appears that that note was given in renewal of a note for seven thousand nine hundred dollars, executed by Dupuy to Mildred D. Smith, on the 20th of August, 1863. As the renewal of a note is not a satisfaction of the debt, but only a change of the evidence of it, the court properly regarded the debt as having been incurred before the first day of June, 1866, notwithstanding the date of the last note given. (*Lowry vs. Fisher*, 2 *Bush*, 70.)

Wherefore, the judgment is affirmed on the original appeal, and the cross-appeal is dismissed.

CASE 17—MOTION—DECEMBER 17.

Calloway, &c., vs. Commonwealth.

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APPEAL FROM FRANKLIN CIRCUIT COURT.

1. In a proceeding in the name of the Commonwealth, without notice or service of process, by motion, in the Franklin circuit court, against the sheriff of Harlan county and his sureties, for failing to pay into the treasury a balance of the revenue due and collectable in the year 1866, the copy of the bond filed by the Auditor shows, on its face, that it was executed at the June term of the county court of said county, and not at the January or February term as required by law. Without allegation or explanation no judgment should have been rendered against the sheriff and his sureties on the motion; *the judgment of the circuit court against them is reversed.*

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2. No power or authority is conferred by the statute on the county court to take the original bond from the sheriff for the collection of the revenue, at any other terms of their court than those named (January or February term), and no option is given to the sheriff; but if he fails to execute the bond at one or the other of the terms prescribed, his office shall thereby be forfeited.
3. The remedy, on motion, authorized by the statute against a defaulting sheriff, is anomalous in judicial proceedings, and, if not harsh, certainly *ex parte*, and when adopted the requirements of the statute must appear to have been complied with, and the liability of the sheriff and his sureties clearly shown.
4. The power of the county court to require the sheriff to execute supplemental bonds at other terms of the court, after having executed a bond either at the January or February term of the court, either for the indemnity of his sureties or that of the Commonwealth, cannot be questioned.
5. "An act for the benefit of B. Calloway, late sheriff of Harlan county," approved March 5, 1867 (2 *vol. Ses. Acts*, 286), does not change or enlarge the responsibility of, or the remedy against, said sheriff and his sureties.

A. J. JAMES, For Appellants,

CITED—

Revised Statutes, 2 *Stanton*, 261, 262.

Act of January 24, 1865, *Myers' Sup.*, 407.

JOHN RODMAN, Attorney General, For Appellee,

CITED—

3 *Met.*, 238; *Lowe vs. Commonwealth.*

1 *Met.*, 139; *Stokes vs. Kirkpatrick.*

Rev. Stat., 2 *Stanton*, 261, 262, 263, 268.

Act of March 5, 1867; *also Ses. Acts*, 1867–8, *vol.* 1, *page* 39.

Act of Feb. 17, 1866, *abolishing June term Franklin circuit court, except for trial of equity causes.*

9 *B. Mon.*, 131; *Commonwealth vs. Davis.*

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JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This is a proceeding by motion in the Franklin circuit court in the name of the Commonwealth against B. Calloway, as sheriff of Harlan county, and his sureties, for failing to pay into the Treasury a balance of the revenue due and collectable in the year 1866.

Judgment was rendered on the 16th of October, 1867, against the defendants for the sum of two thousand three hundred and fifty-four dollars and sixty-four cents, with interest from the 1st of June, 1866, till paid, with costs and damages; and from that judgment the defendants below have appealed.

The first objection made to the judgment is, that, by the copy of the bond filed in the case, it appears it was executed by the sheriff and his sureties at the *June term*, 1866, of the Harlan county court; and, as the sheriff was required by the statute to execute the bond for the collection of the revenue at the January or February term of each year (2 *R. S.*, 262), the county court had no legal authority to take the bond of the sheriff for the collection of the revenue at any other term than one of those named; consequently, the bond executed by appellants at the June term, 1866, was without lawful authority in the court to take it; was not valid as a statutory bond; and if good as a common law bond, before judgment could have been rendered thereon there must have been an action against the obligors, with service of process. Whether or not that position is maintainable, we propose now to consider.

By section 3, article 9, chapter 83, 2 Revised Statutes, page 262, the sheriff of each county is required to enter into bond, with security, for the collection of the revenue and public dues at the January or February term of the county court in each year.

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Section 1, article 11, of the same chapter, page 268, provides, that if any sheriff, clerk, or other person, authorized to collect or receive the public money, revenue, or tax, shall fail to account for or pay into the Treasury, as required by law, the Auditor shall proceed in the name of the Commonwealth, by motion *or suit, without notice* to the parties, to collect the same by judgment and execution against such sheriff, clerk, or other person, and their sureties, heirs, distributees, devisees, and personal representatives, jointly and severally, at the next or any subsequent term succeeding such defalcation.

The next or second section provides, that the motions or suits in the preceding section mentioned shall be docketed for trial on the third day of the term; and the Auditor is required to file with the clerk of the court a memorandum in writing of the names of the parties, the amount due from each defaulter against whom judgment is demanded, and also a copy of the official bond, if any; and the clerk shall docket such motions or suits in the order in which the names stand on said memorandum.

By section 1, article 9, of said chapter, page 261, the sheriff, by virtue of his office, is made the collector of the revenue; and if he fail or refuse to execute bond, with surety, as required by law, for the collection thereof, he shall forfeit his office; and if, after he gives the bond, he fails to pay into the Treasury, by the time prescribed by law, the whole revenue due to the Commonwealth and collected by him, he shall forfeit his office.

The language of the several sections of the statute here quoted is imperative, the terms of the county court at which the bond shall be executed by the sheriff specifically named, and the number limited to two. No power or authority is conferred by the statute on the

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county court to take the *original* bond from the sheriff for the collection of the revenue at any other terms of their court than those named, and no option is given to the sheriff; but if he fails to execute the bond at one or the other of the terms prescribed, his office shall thereby be forfeited.

The inquiry is not now whether the bond executed by the sheriff in June, 1866, is a good common law bond, as his office had not been adjudged by the proper tribunal forfeited, and as such the sheriff and his sureties may be made responsible for the revenue; but can they on this bond be proceeded against by motion, and in the summary way prescribed as a statutory bond, and judgment rendered thereon without notice or service of process?

The remedy authorized by the statute against a defaulting sheriff is anomalous in judicial proceedings, and if not harsh, certainly *ex parte;* and when adopted, the requirements of the statute must appear to have been complied with, and the liability of the sheriff and his sureties clearly shown.

The power of the county court to require the sheriff to execute supplemental bonds at other terms of the court, after having executed a bond either at the January or February term of the court, either for the indemnity of his sureties or that of the Commonwealth, cannot be questioned; and it would be hazardous to say that, in an action against the sheriff and his sureties as contradistinguished from a mere motion in the statute, with the necessary and appropriate allegations that such bonds were executed, that the sheriff and sureties would not be liable; but in a proceeding by motion, with a copy of a bond filed, which shows on its face that it was not taken at the time prescribed by law, and without alle-

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gation or explanation, no judgment should have been rendered against appellants, as the summary remedy prescribed by statute and attempted to be pursued in this case applied to sheriffs and their sureties who have executed bonds as required by the *statute;* nor does the act approved March 5, 1867, entitled "An act for the benefit of B. Calloway, late sheriff of Harlan county" (*2d vol. Sess. Acts*, 286), change or enlarge the responsibility of, or the remedy against, said sheriff and his sureties.

Wherefore, the judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

CASE 18—PETITION ORDINARY—DECEMBER 23.

Cason vs. Wallace.

APPEAL FROM GRANT CIRCUIT COURT.

1. It is impossible for the same person to be obligor and obligee in the same note.
2. The obligee in a note, long after it was executed to him, assigned it to a third party, and wrote his name under the name of the obligor. The circumstances conduce to show that the assignor intended to sign the note as guarantor. The inadvertent mislocation of his name did not make the note legally void, and the assignee might maintain his action on it against the sole obligor.
3. An assignee of a note has a right to sue the obligor, only on the note; but he has no cause of action against him on the original consideration.

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Cason vs. Wallace.

GEORGE C. DRANE, For Appellant,

CITED—

3 *Met.*, 285; *Muhling vs. Sattler, &c.*
2 *Parsons on Notes and Bills, p.* 124, *n. p.*
Story on Promissory Notes, sec. 467.

CRADDOCK & TRABUE, For Appellee,

CITED—

Myers' Supplement, p. 741.
3 *Met.*, 285; *Muhling vs. Sattler.*
MSS. Opin., June, 1858; *Taylor vs. Taylor.*
Revised Statutes, 1 *Stanton*, 267.
3 *Mon.*, 252; *Roberts vs. Finnell.*
2 *Marshall*, 138; *Morton vs. Fletcher.*
2 *Met.*, 228; 1 *Bush*, 381.
1 *Mar.*, 24; *Keith vs. Patton.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The impossibility of being both obligor and obligee on the same note; the absurdity of making the note of Nichols legally void by the subsequent signature of Cason's name as apparent co-obligor to himself as obligee; the date of his signature, long after the execution of the note by Nichols to him and after his assignment of it to Carden, the assignor, to the appellee, conduce to the conclusion that Cason's name under that of Nichols was an inadvertent mislocation of it, and that he thus signed the note as mere guarantor; and Carden's statement might tend to show, that, as he was willing to take the note as a mere assignee, the superadded guaranty was gratuitous. On this construction, the suit ought to have been brought, and might have been maintained, against Nichols as sole obligor; and there was no cause of action on the original consideration. But if a suit could be main-

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tained on the original consideration, Carden's assignment to Wallace gave *him* only a right to sue on the note, but no cause of action to sue on the original consideration. Carden alone could do that; *he* has not done it.

Wherefore, on these grounds, the judgment is reversed, and the cause remanded, with instructions to dismiss the petitions.

CASE 19—MANDAMUS—DECEMBER 23.

Hammock vs. Barnes, &c.

APPEAL FROM CALDWELL CIRCUIT COURT.

1. A tie vote for two candidates for the office of town marshal of the town of Princeton, having been received at an election for town officers, under the special statute, which neither required nor authorized the examiners to do more than to examine the polls and report the legal number of votes cast for each candidate, said board of examiners had no right to decide by casting lots. Such a decision would be illegal and void, and cannot be compelled by mandamus.
2. The general law regulating the examining boards in State, district, and county elections, and requiring them to cast lots in cases of tie votes, does not embrace town elections under special statutes for town officers. The circuit court properly refused a mandamus against the board of examiners to compel them to decide by casting lots between two candidates having an equal number of votes for the office of town marshal of the town of Princeton.

GEO. W. DUVALL, For Appellant,

CITED—

Revised Statutes, chap. 32, *art.* 3, *sec.* 2; *also sub-sec.* 4.

1 *Stanton*, 438, *sec.* 7, *p.* 439.

Acts 1853–4, *vol.* 2, *p.* 231, *sec.* 19; *also p.* 229, *sec.* 13.

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1 *Met.*, 540; *Batman vs. Megowan.*
1 *Duvall*, 37, 40; *Surman vs. Henton.*
Stanton's Code, p. 107; *Myers' Code, pp.* 37, 45, *and note* 144.

P. H. DARBY, For Appellees,

CITED—

2 *Sess. Acts*, 1853–4, *p.* 231.
Revised Statutes, chap. 32, *art.* 5; 1 *Stanton*, 436–39.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

At an election of town officers in Princeton, Caldwell county, Kentucky, the appellees, constituting the board of examiners to compare the polls, reported that the appellant and M. E. Mitchasson had received an equal number of legal votes for town marshal, and, declining to decide by lot which of them should be declared elected, the appellant filed in the circuit court a petition for a *mandamus* to compel the examiners to decide the contest by casting lots between the competitors.

The circuit court overruled the petition, and on this appeal this court adjudges that decision right.

The special statute by which that election was regulated neither required nor authorized the examiners to do more than to examine the polls and report the legal votes cast for each of the candidates; and the general law regulating the examining boards in State, district, and county elections, and requiring them to cast lots in cases of tie votes, does not embrace this case. Had the appellees presumed to decide by lottery, their decision would, therefore, have been illegal and void.

Wherefore, the judgment of the circuit court is affirmed.

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CASE 20—PETITION ORDINARY—DECEMBER 23.

Middleton, &c., vs. Caldwell.

APPEAL FROM LINCOLN CIRCUIT COURT.

1. A sheriff is not bound, in his official capacity, to receive and collect taxes in arrear due to his predecessor, unless such predecessor died, resigned, or was removed from office; and as the sheriff was not bound to receive and collect such taxes, his sureties are not liable for them on his official bond. (*Edwards, ex'r, vs. Taylor, &c.*, 4 *Bibb*, 353; *Revised Statutes, sec.* 16, *art.* 9, *chap.* 83, 2 *Stanton*, 265.)
2. It is the duty of the sheriff and his deputies to receive and collect all officers' fees listed with him or any of his deputies, due and payable in his county, during his term of office, and to account for and pay over the same to the persons entitled thereto, at the time and in the manner prescribed by law; and his sureties are liable on his official bond for such officers' fees. (*Revised Statutes, sec.* 17, *art.* 1, *chap.* 91, 2 *Stanton*, 343.)

HILL & ALCORN, For Appellants,

CITED—

Revised Statutes, sec. 3, *art.* 1, *chap.* 91, *and secs.* 15, 16, *art.* 9, *chap.* 83; *also M. & B.*, 1455.
4 *Bibb*, 353; *Edwards, ex'r, vs. Taylor.*
1 *Met.*, 637; *Allen vs. Ramsey's heirs.*
Act of Feb. 27, 1860, 2 *Stanton*, 807.

GEO. W. DUNLAP and
DURHAM & JACOBS, For Appellee,

CITED—

Revised Statutes, 2 *Stanton*, 265, 339, 343, 346, *sec.* 37.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

In 1862 Middleton was sheriff of Lincoln county, and the other appellants were his sureties, and appellee was

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his immediate predecessor in office. On the 29th of March, 1862, appellee placed in the hands of Middleton a list of taxes on persons in said county due while he was sheriff, and uncollected by him, although he had (as he alleges) paid their amounts into the treasury; and also certain fee bills due by persons in said county to him; and this action was brought by appellee against Middleton on his official bond, and his sureties, to enforce the payment of the amount of said tax lists and fee bills; and they now seek to reverse a judgment which was rendered against them therefor.

The condition of the sheriff's covenant is, that he shall, by himself and deputies, well and truly discharge all the duties of said office, and pay over to such persons, and at such times as they may be respectively entitled to the same, all moneys that may come to his or their hands as sheriff.

If Middleton was bound by the duties of his office to receive and collect the list of taxes uncollected, then, having receipted therefor, he would unquestionably be liable as sheriff, and, consequently, would involve his sureties in the same liability; but if he was not bound to receive them in his official capacity, his sureties could not be made liable, as they are only responsible for his official delinquencies. We have been unable to find any statute requiring the sheriff to receive and account for such list of taxes in arrear.

Section 16, article 9, chapter 83 (2 *R. S.*, 265), provides, that if a sheriff shall resign, die, or is removed from office, his successor shall proceed to collect any arrearages of tax or public dues, and shall account for the same as other public revenue collected or to be collected by a sheriff. And the preceding *section* gives power to sheriffs for twelve months, after the expiration of their term of

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office, to collect any arrearages of revenue which fell due during their official term.

Neither of the contingencies provided for in *section* 16, *supra*, had happened, or at least there is no allegation to that effect; consequently, Middleton was not bound, by law, to receive and collect said taxes, and having voluntarily received a list of them, he could not thereby impose a liability on his sureties which the law did not.

In *Edwards, ex'r, vs. Taylor, &c.* (4 *Bibb*, 353), this court construed the 15*th section* of the *act of* 1796, similar in its provisions to the section of the Revised Statutes now under consideration, in the same way, and held that it was not the legal duty of the sheriff to receive and collect for his predecessor taxes due and uncollected by him, which must be regarded as authoritative.

If it were the official duty of the incoming sheriff to receive and collect the taxes uncollected by his predecessor in all cases, there would seem to be no reason for the enactment of the 15*th section* conferring upon the outgoing sheriff power for twelve months, after the expiration of his term, to collect taxes in arrear.

By section 17, article 1, chapter 91 (2 *R. S.*, 343), it is made the duty of the sheriff and his deputies to receive and collect all officers' fees listed with him or any of his deputies, due and payable in his county during his term of office, and to account for and pay over the same to the persons entitled thereto at the time and in the manner required by law, so that the fee bills received by Middleton must be accounted for, or his sureties will be liable for the same.

But, for the reasons stated, the judgment is *reversed*, and the cause remanded for further proceedings consistent with this opinion.

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CASE 21—PETITION EQUITY—JANUARY 7.

Steamboat Hyatt and Owner vs. Reitz & Haney.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

1. In an action in equity in the Livingston circuit court against the owner of the steamboat Hyatt, on a note given by him at Evansville, Indiana, for boilers furnished his boat and repairs of its engine, on a special contract made by the owner, *the boat being attached*, the circuit court properly rendered a personal judgment against the defendant, and also for enforcing the asserted lien on his boat.
2. Maritime contracts made on the sea, or any of its tributaries, not within the jurisdictional limits of any State, always operate *in rem;* and contracts for repairs or supplies of a ship or boat, at the instance of the master only, and not at its home port, are made *ex necessitate* on the credit of the vessel, and, therefore, imply a lien on it; but—
3. When the contract for repairs or supplies of a vessel is made in the home port, or by the owner himself, there or elsewhere, it is presumptively made on his personal credit alone, and does not imply a lien on his vessel; and this latter class of contracts are not, in the constitutional sense, maritime, so as to give jurisdiction to the Federal courts, but all depend on the common law, and are remediable in the State courts, according to the local laws which guide and govern them.

W. D. GREER and
JOHN RODMAN, For Appellants,

CITED—

Civil Code, sec. 264.
4 *Wallace*, 556; *The Hine vs. Trevor.*
4 *Wallace*, 411; *The Moses Taylor.*
Judiciary Act of Congress of 1789.
18 *B. Mon.*, 261; *Hughey, &c., vs. Sidwell's heirs.*

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C. BENNETT, For Appellee,

CITED—

3 *Mason*, 91; *Willard vs. Dorr.*
4 *Mason's C. R.*, 380; *Plummer vs. Well.*
11 *Peters; Orleans vs. Phœbus.*
20 *Howard*, 168; *Grant vs. Poillon.*
20 *Howard*, 401; *People's Ferry, &c., vs. Beers.*
22 *Howard*, 130; *Roach, &c., vs. Steamer Capital.*
19 *Howard*, 31; *Thomas, &c., vs. Osborn.*
19 *Howard*, 91; *Vandewater vs. Mills.*
23 *Howard*, 215; *Philadelphia, &c.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

This suit in equity was brought by the appellees against the appellant on his promissory note for boilers furnished to his steamboat J. L. Hyatt, and repairs of its engine by them, in fulfillment of a special contract previously made with *him* as owner of the boat. Claiming a lien on the boat, the petition sought a judgment *in personam*, and also *in rem*. The contract was made at Evansville, Indiana; the appellant's domicil is Crittenden county, Kentucky; and his boat, running on the Ohio river, was attached at Smithland, on that river.

The circuit court rendered a personal judgment against the appellant, and judgment also for enforcing the asserted lien on his boat.

And the only question presented by this appeal is, whether the contract was technically maritime, and whether, therefore, the State or Federal court had jurisdiction to enforce it.

Maritime contracts made on the sea or on any of its tributaries, not within the jurisdictional limits of any State, always operate *in rem;* and contracts for repairs or supplies of a ship or boat, at the instance of the mas-

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ter only, and not in its home port, are made, *ex necessitate*, on the credit of the vessel, and, therefore, imply a lien on it. But when the contract is made in the home port, or by the owner himself, there or elsewhere, it is presumptively made on his personal credit alone, and does not imply a lien on his vessel; and this latter class of contracts are not, in the constitutional sense, maritime, so as to give jurisdiction to the Federal courts, but all depend on the common law, and are remediable in State courts, according to the local laws, which guide and govern them. To sustain these positions, citations of authorities, which are abundant and uniform, would be unnecessary supererogation.

No Federal court could, therefore, have maintained jurisdiction in this case; and the resulting jurisdiction of the State court is the necessary and obvious alternative; and, consequently, the Code of Practice having given a lien on the boat in all such cases as this, the judgment *in rem*, as well as that *in personam*, must be affirmed.

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CASE 22—PETITION EQUITY—JANUARY 11.

Commonwealth, for use of M. S. Johnson, vs. Turley, ex'r of D. Lillard.

Commonwealth, for use of Jos. Lillard, vs. Turley, ex'r of D. Lillard.

APPEALS FROM GALLATIN CIRCUIT COURT.

LEGACIES "*to be paid by my executor with as little delay as practicable.*"—Legatees, having resisted the establishment of the will by a protracted litigation, are not entitled to interest on their legacies from one year after testator's death (*Rev. Stat., sec.* 2, *art.* 2, *chap.* 46, 2 *Stant.*, 2); but as it did not appear that the executor had either used or loaned the money, but held it ready to discharge the legacies, the legatees are entitled to interest only from the establishment of the will.

J. J. LANDRAM, For Appellants,

CITED—

Revised Statutes, 2 *Stanton, sec.* 2, *p.* 2; 1*st Ib., sec.* 25, *p.* 507; 8 *Dana*, 73; *Smith vs. Lampton and wife.*
2 *B. Mon.*, 261; *Montjoy and wife vs. Lashbrook, &c.*
8 *Dana*, 8; *Nixon's heirs vs. Nixon's adm'r.*

H. J. ABBETT and
W. B. WINSLOW, For Appellees,

CITED—

1 *Dana*, 398; *Taylor vs. Knox's ex'r.*
Littell's Select Cases, 475; *Webb vs. Coon.*
2 *Littell*, 344; *Quinn vs. Stockton.*
14 *B. Mon.*, 477; *Crow's adm'r vs. Crow.*

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Commonwealth, for use of M. S. Johnson, vs. Turley, ex'r of D. Lillard.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The executor of D. Lillard, deceased, propounded decedent's will for record, which the legatees, for whose use these suits were brought, resisted, and which resulted in a protracted litigation of several years before the will was established; the executor, in the meantime, holding the funds to pay the specific legacies, which he offered to discharge without interest, within less than a year after the will was established. The legatees, however, claiming interest from one year after the testator's decease, brought these suits to recover it, but which the court refused; and this is the only question involved in these appeals.

By section 2, article 2, chapter 46 (2 *Stant. Rev. Stat.*, 2), it is provided, that "if no time is fixed for the payment of a specific legacy, it shall be payable one year after the testator's death."

By the second item of the will, one thousand dollars is bequeathed to M. S. Johnson, and eight hundred dollars to Joseph Lillard, "*to be paid by my executor with as little delay as practicable.*"

Waiving all questions as to whether this should not be construed as fixing a reasonable period to be allowed the executor for collecting the debts due and converting the property into money, it certainly did not contemplate the payment of the legacies immediately upon the testator's death, nor within one year thereafter, but that they should be paid at the earliest practicable moment. It may have been that the testator contemplated what really occurred —a litigation over his will; but however this may be, the establishment of the will was an essential prerequisite to the payment of the legacies; for if it was not the testator's legal will, no legacies would be due or collectable;

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so that the earliest *practicable moment* for the payment of the legacies would be upon the admission of the paper to record as the testator's will.

As the litigation was protracted by the appellants' own conduct, and as they rendered it *impracticable* to sooner pay the legacies, we see no reason why they should be permitted to charge the estate with interest from one year after the testator's death; and as it does not appear that the executor either used or loaned the money, but he seems to have held it ready to discharge these legacies at *the earliest practicable period*, there is no legal reason shown why he should be charged with a like interest.

Had these legatees sought to have had the money loaned out under the direction of the court, it might have been proper for the court to have done so; but it certainly was not the legal duty of the executor voluntarily to loan out the funds.

Wherefore, the judgment is affirmed in both cases.

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CASE 23—PETITION—JANUARY 12.

Brown, &c., vs. Burdett, &c.

APPEAL FROM GARRARD CIRCUIT COURT.

The "act regulating the sale of partnership property taken in execution for the separate debt of one of the partners," approved February 12, 1858 (*Revised Statutes*, 2 *Stanton*, 513–14–15), was intended to provide only for sales of partnership property, and did not contemplate sales of the interest of a joint tenant of land.

R. M. & W. O. BRADLEY, For Appellants,

CITED—

2 *J. J. M.*, 35; *Wolford vs. Phillips.*
6 *Mon.*, 111; *Webber vs. Stith.*
MSS. Opn., *April*, 1867; *Owsley vs. Cook.*
1 *Bush*, 249; *Skillman vs. Hamilton.*
3 *Dana*, 219; *DeWolfe, &c., vs. Mullett's adm'r.*
18 *B. Mon.*, 665; *Watson vs. Gabby.*
Revised Statutes, 2 *Stanton*, 513–14–15.
Civil Code, *sec.* 714.

GEO. R. McKEE and
M. H. OWSLEY, For Appellees,

CITED—

1 *Greenleaf's Ev.*, 93, 94, 376.
Civil Code, *secs.* 669, 670, 393; 8 *Dana*, 199.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The pleadings, proofs, and acts of the parties have reduced this litigation, when properly analyzed and judicially considered, to a single question involved in

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the sale of the thirty-two acre tract of land, and that is, whether the statute of February 12th, 1858 (*2d vol. Stant. R. Stat., p.* 513–14–15), applies to the sale of that land under execution.

That enactment was the probable offspring of the decision of this court in *Watson vs. Gabby* (18 *B. M.*, 665), as to the sale under execution of the interest of one partner in partnership property; and the title of the act—the third section of which can apply only to movable property, the seventh section, which cannot apply to immovables, and the context and presumed object of the act, conduce to the conclusion that it intended to provide only for sales of partnership property, and did not contemplate sales of the interest of a joint tenant of land; and this court, therefore, adjudges this restrictive application to be the true legislative intent.

Therefore, as the judgment harmonizes with this interpretation, it is affirmed.

The Chief Justice did not sit in this case.

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CASE 24—PETITION ORDINARY—JANUARY 12.

Commonwealth, for use of Young, vs. Peters, &c.

APPEAL FROM WOODFORD CIRCUIT COURT.

1. A judgment on demurrer, dismissing plaintiff's petition, is virtually a judgment against cause of action, and must be considered a final judgment, and an appeal may be taken to reverse it.
2. When a constable has authority to execute the process of the court having original jurisdiction of the amount of a debt placed in his hands for collection, the sureties in his official bond are liable for the amount when collected by him, which, in this case, was seventy-five dollars. (*Arnold vs. Sommers*, 3 *Bush*, 555.)

H. C. McLeod, For Appellant,

CITED—

14 *B. Mon.*, 29; *Harris vs. Teal.*
1 *Metcalfe*, 411; *Lane vs. Casey.*
3 *Metcalfe*, 87; *Fenwick vs. Phillips.*
Revised Statutes, *section* 2, *article* 4, *chapter* 20.
Civil Code, *section* 33, *act of Feb.*, 1856, 1 *Stanton*, 259.

Porter & Greathouse, For Appellees,

CITED—

14 *B. Mon.*, 30, 31; *Commonwealth, for use of Harris, vs. Teal.*
17 *B. Mon.*, 334; *Masterson vs. Hagan.*
2 *Met.*, 128; *Lytle vs. Lytle.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

This action was brought in the Woodford quarterly court by the Commonwealth for the use of Madison Young, against Leonidas B. Peters, and Thomas P.

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Porter and John H. Jesse, his sureties, for an alleged breach of Peters' official bond as constable of Woodford county, by failing to pay to the relator seventy-five dollars which Peters, in his official capacity, had undertaken to collect, and did afterwards collect on a note for fifty-three dollars and forty-three cents, executed to said Young by Thos. K. Layton. On an appeal from a judgment against the principal and sureties, the circuit court sustained a demurrer to the petition, and this appeal to this court seeks a reversal of that judgment, which, as it virtually adjudged against any cause of action, must be considered a final judgment in the case.

The only plausible ground of demurrer is the assumption that the sureties are not liable, because, as asserted, the collection of the money was not an official act by their principal; but we think that it was official.

The condition in the bond requiring the constable to collect "*all notes*" put into his hands for collection, has been, so far as the sureties are bound, construed by this court in the case of the *Commonwealth, for Arnold, vs. Sommers* (3 *Bush*, 555), to mean such, and only such, as he has legal authority to collect as constable.

In this case the constable had authority to execute the process of the court having original jurisdiction of the amount to be collected; and, therefore, his undertaking to collect it, and his actual collection of it, were both within his official sphere; and his sureties, being bound for his official fidelity, seem to be liable for his alleged failure to pay to Young the money he collected for him; consequently, the circuit court erred in sustaining the demurrer.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

Judge Peters did not sit in this case.

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CASE 25—PETITION EQUITY—JANUARY 12.

Johnson, &c., vs. Belt.

APPEAL FROM SCOTT CIRCUIT COURT.

1. The right of a creditor of a decedent to sue his heirs or devisees in equity, is expressly conferred by the Revised Statutes. (*Sec.* 10, *chap.* 40.)
2. The provision of section 473 of the Civil Code, which requires a demand, of the debt claimed, before an action shall be brought against a personal representative, is restricted in its application to actions against personal representatives. A failure to make, such demand, is not an available ground for dismissing an action against the heirs or devisees of a decedent.

M. POLK, For Appellants,

CITED—

18 *B. Mon.*, 229; *Clarke vs. Seaton.*
14 *B. Mon.*, 395; *Daniel vs. Judy.*
1 *Duvall*, 281; *Smith vs. Curtis.*

W. S. DARNABY, For Appellee,

CITED—

Civil Code, sec. 473.
Revised Statutes, 1 *Stanton*, 509, 510, 553.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The right of a creditor of a decedent to sue his heirs or devisees in equity, as was done in this case, is expressly conferred by the 10th section of chapter 40 of the Revised Statutes.

The affidavit affixed to the written evidence of the plaintiffs' claim is in substantial conformity to the requirements of section 34 of article 2 of chapter 37 of the Revised Statutes; and as the provision of section 473 of the

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Civil Code, which requires a demand of the debt claimed before an action shall be brought against a personal representative, is restricted in its application to actions against personal representatives, the failure to make such demand was not an available ground for dismissing this action against the claims of McDonald.

The court properly overruled the motion to dismiss the action, and we perceive no error in the judgment, which is therefore affirmed.

CASE 26—PETITION ORDINARY—JANUARY 12.

4bu 406
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136 190

Mason vs. Trustees of Lancaster.

APPEAL FROM GARRARD CIRCUIT COURT.

1. "The trustees shall have the right to tax, and right to license all taverns within the limits of said town, granting to, withholding from the same, as may be deemed expedient by said trustees, the privilege of selling by retail, wines, brandies, whisky, rum, and other spirituous liquors and intoxicating drinks, *and to fix the tax therefor in a sum not exceeding two hundred dollars on each per annum.*" This act is held to be constitutional.
2. Tavern-keepers may be required to pay a license to towns by authority of legislative enactment, notwithstanding they have paid both the United States and State license.
3. Town authorities, being so authorized by law, may refuse to grant a license to sell spirituous liquors to a tavern-keeper therein, and without such license, he will not be authorized to sell the same, by paying for and obtaining a license from the United States, and also from the State.
4. Town authorities may constitutionally be authorized by law to levy taxes and impose licenses for revenue, for municipal purposes.

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Mason vs. Trustees of Lancaster.

GEO. R. MCKEE, For Appellant,

CITED—

Session Acts, 1867, *vol.* 2, *p.* 390.
9 *Dana*, 516; *City of Lexington vs. McQuillan's heirs.*
18 *B. Mon.*, 15; *City of Louisville vs. Kean.*
Burrell's Law Dictionary—"*Tax.*"
Constitution of Kentucky, *sec.* 2, *art.* 13.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

By section 20 of the act of March 9, 1867, "to reduce into one the several acts in regard to the town of Lancaster," it is enacted that the trustees "shall have the right to tax and right to license all taverns within the limits of said town, granting to, withholding from the same, as may be deemed expedient by said trustees, the privilege of selling by retail wines, brandies, whisky, rum, and other spirituous liquors and intoxicating drinks, *and fix the tax therefor in a sum not exceeding two hundred dollars on each per annum.*"

Appellant having gone to considerable expense in purchasing and refitting and furnishing a house for public entertainment in Lancaster, paid to the United States collector thirty dollars for its license to keep a tavern, with the right to retail ardent spirits, and the trustees of the town demanded of him one hundred and twenty-five dollars for a like privilege, which he paid under protest, twenty-five dollars of which went into the Treasury of the State, and one hundred went into the town treasury; and to recover this latter sum he brought suit against the said trustees, which the court below disallowed, and he seeks a reversal.

This suit is predicated upon the asserted unconstitutionality of said enactment; for if it be valid law, the trustees did not demand as much as said statute authorized.

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The legislative power of raising revenue for the State or local communities has not been restricted by the State Constitution, nor inhibited by the Federal Constitution. The power to raise revenue being unrestricted, this court cannot interfere with the statutes, whilst the enactments are confined to such purposes, however impolitic it may seem.

It is true that the principle of equality running through our constitutional system of government does not admit of discrimination in behalf of one citizen to the detriment of another, and, therefore, the trustees, under the discretionary power conferred by this statute, could not license one individual for one hundred dollars, whilst they should charge another two hundred dollars for the same privilege; but they could determine not to grant such license to any one for less than any given sum not exceeding two hundred dollars, and this would put all upon equality; nor would this equality be destroyed by the refusal to license any one they might deem unsuitable for such purpose, either because of immorality, want of qualification, or because not suitably prepared for such business, nor a total refusal to any one after a sufficiency of such public houses had been licensed and set up.

This licensing system has been so long exercised by this State, so generally adopted and exercised by our sister States and the United States, that we cannot doubt the constitutional power in the Legislature to enact such statutes; and whilst confined within revenue purposes, such statutes are beyond our control.

It is possible that a statute so flagrantly beyond revenue purposes as to indicate other objects under its guise might be violative of constitutional rights; but before this court would determine such, it would have to appear palpable and unmistakable; for without such, this court would not

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presume such unworthy motives in a co-ordinate branch of the government. This statute is not even liable to a suspicion of such motives; for it leaves with the local legislative board to fix the amount, only limited not to transcend the given sum of two hundred dollars; nor does this conflict with any previous adjudication of this court.

Wherefore, the judgment is affirmed.

CASE 27—PETITION ORDINARY—JANUARY 13.

Corley's ex'r vs. Evans and wife.

APPEAL FROM SHELBY CIRCUIT COURT.

1. A document styled a bill of exceptions, professing to state the facts, which may have been actually exhibited in the circuit court, and which does not appear to have been either signed or filed in court, cannot be judicially noticed or considered by the Court of Appeals.
2. Time being allowed by the circuit court to complete a bill of exceptions in vacation, the presumption is, that it was signed extra-judicially, out of court, and is, therefore, according to the Code, unauthorized and void.
3. In the absence of testimony to the contrary, the Court of Appeals must presume, that the verdict was authorized by the proof, and the judgment of the circuit court, consequently, right.

BULLOCK & DAVIS and
J. L. CALDWELL, For Appellant,

CITED—

Civil Code, secs. 359, 414.
1 *Greenleaf's Ev., sec.* 82.
3 *Marshall*, 80; *Gillaspie vs. Osborne.*

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3 *Bibb*, 26; *Hart's heirs vs. Coram.*
6 *Johnson's R.*, 59; 3 *Cowan*, 611, 615.
Munf., 437; *Mason's dev. vs. Peters' adm'r.*
1 *Johnson*, 66; 3 *Johnson*, 536; 3 *Cowan*, 623.
4 *Cowan*, 483, 492; *Barn.*, 436.

Z. WHEAT and
W. MONTFORT, For Appellees,

CITED—

Civil Code, sec. 364.
17 *B. Mon.*, 603; *Freeman vs. Brenham.*
2 *Met.*, 297; *Allard vs. Smith.*
2 *Met.*, 378; *Tweedy vs. Commonwealth.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Whether right or wrong on the facts which may have been actually exhibited in the circuit court, we cannot judicially know. Those facts do not appear in the record in a cognizable form. The document professing to state them, and styled a bill of exceptions, does not appear to have been either signed or filed in court; but, as time was allowed for completing it in vacation, the presumption is, that it was prepared and signed extra-judicially out of court, and is, therefore, according to the Code of Practice, unauthorized and void.

We are, therefore, not permitted to notice it judicially; and, consequently, as we must, in the absence of testimony to the contrary, presume that the verdict was authorized by the proof and the judgment consequently right, we cannot reverse.

Wherefore, the judgment is affirmed.

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CASE 28– PETITION EQUITY—JANUARY 13.

Farmers' Bank of Ky. vs. Johnson, &c.

APPEAL FROM SCOTT CIRCUIT COURT.

Old and infirm slaves having been sold to the lowest bidder—that is, to the one who would agree to provide for them, and bury them plainly and decently, for the least sum—to be paid out of the estate of their owner: being deprived of any control over them by the adoption of the Constitutional Amendment abolishing slavery, the purchaser was thereby released from his obligation to support and bury them, and they became a charge upon public charity.

T. N. & D. W. LINDSEY, For Appellant.

M. STEVENSON and
W. C. GOODLOE, For Appellees,

CITED—

2 *B. Mon.*, 354; *Moor & Taylor vs. Story.*
3 *Met.*, 31, 32; *Robinson vs. Bright's ex'r.*
Revised Statutes, 1 *Stanton*, 150; *sec.* 20, *Constitution.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The original judgment, ordering a sale of Johnson's lands, slaves, &c., to pay his creditors, and directing that the aged and infirm slaves, Nancy and Harry, should be sold to the lowest bidder—that is, to the one who would provide for them, and bury them plainly and decently, for the least sum—to be paid out of the assets of the insolvent debtor, was only providing out of his estate for both the legal and moral obligation resting on him to take care of his aged and infirm *slaves*. Had these slaves not been sold, Johnson would have been released from this

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obligation when the United States Government abolished the relation of master and slave; having destroyed his right to the labor and control of these negroes, it released him from his legal obligation to support them, and placed them where all other free paupers belong, as a charge upon public charity.

As the Government released the slave from all legal control and interest of the master, so it released him from all legal obligation to the slave.

The bank got Johnson's legal rights to these aged and infirm slaves, and was entitled to their services, whatever may have been the value thereof, and became legally responsible for their maintenance whilst remaining slaves, and for decent burial if they should die in slavery; but when the right to control the service of these slaves ceased by the political action of the Government, the bank's legal liability to maintain and bury them was also abolished.

Wherefore, the judgment is reversed, with directions to dismiss all proceedings against the bank to compel it to maintain said infirm negroes since the adoption of the Thirteenth Amendment to the United States Constitution.

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CASE 29—INJUNCTION—JANUARY 13.

Offut's ex'x vs. Bradford, &c.

APPEAL FROM SCOTT CIRCUIT COURT.

1. Although an interlocutory order merely dissolving an injunction is not a final decree, revisable by the Court of Appeals, yet a judgment for damages on the dissolution is final, and may be enforced by execution *pendente lite;* consequently, when the amount of damages will authorize an appeal, the Court of Appeals has jurisdiction alone to correct it.
2. On the dissolution of an injunction sued out by an executrix for her own benefit as devisee, the judgment for damages was properly rendered against her personally, and not against the assets.
3. An injunction against the creditors of a decedent, cannot be sued out more than three years after the qualification of the personal representative. (*Civil Code, sec.* 472.)

M. POLK, For Appellant,

CITED—

Revised Statutes, sec. 40, *chap.* 37, 1 *Stanton*, 513.
3 *J. J. M.*, 302; *Judah vs. Chiles.*
Pr. Dec., 282; *Lee vs. Gullion.*
2 *J. J. M.*, 444; *Ward vs. Davidson.*
2 *Dana*, 422; 3 *J. J. M.*, 424.
8 *Dana*, 12; *Story vs. Hawkins.*

JAMES F. ROBINSON, For Appellee.

[Brief not in records.]

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Although an interlocutory order merely dissolving an injunction is not a final decree, revisable by this court, yet a judgment for damages on the dissolution is final,

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and may be enforced by execution *pendente lite;* consequently, as there is a judgment for such damages in this case to the amount of one hundred dollars, this court has jurisdiction alone to correct it; and the motion to dismiss the appeal for want of jurisdiction is overruled. But we cannot reverse the judgment.

The personal judgment against the executrix, instead of being against the assets, is not apparently erroneous, because the injunction was in the appellant's personal character, and for her own benefit as devisee; and, consequently, the judgment for damages cannot be reversed merely because it also is personal, nor can it be reversed on the ground that the appellant's petition would, if filed in time, entitle her to the injunction, for it was not filed within three years after probate of the will and the qualification of the executrix, as required by statute.

Wherefore, we are constrained to affirm the judgment now appealed from.

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CASE 30—PETITION EQUITY—JANUARY 13.

Trumbo vs. Lockridge.

APPEAL FROM BATH CIRCUIT COURT.

A purchaser, who has received a conveyance, cannot resist the payment of a balance of the purchase money on the ground of defects in the title, unless the vendor is insolvent, and the warranty of title or covenant of seizin has been broken so as to entitle the vendee to damages. Such damages, on the application of the vendee, may be set-off by the chancellor against unpaid purchase money. (*Simpson, &c., vs. Hawkins, &c.*, 1 *Dana*, 303.)

B. D. LACY, For Appellant,

CITED—

Civil Code, sec. 40, *and notes.*
2 *Duvall*, 145; *Ogle vs. Clough.*
1 *Met.*, 228; *Denny vs. Wickliffe.*
2 *Duvall*, 185; *Duvall vs. Parker.*
1 *Dana*, 305; *Simpson vs. Hawkins.*

NESBITT & GUDGELL, For Appellee.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

On the 30th day of August, 1856, C. G. Land and wife conveyed to D. S. Trumbo a tract of about twenty-six acres of land, for the consideration of two thousand dollars—the deed reciting the payment of one thousand dollars thereof, and the execution of two notes by Trumbo to Land, of five hundred dollars each, for the residue.

Land, having made an assignment to D. S. Lockridge in trust for the payment of his debts, this suit was brought

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in 1866 in the names of Land and Lockridge, as his trustee, for the recovery of one of said notes, and an enforcement of a lien on the land for its payment.

The defendant, by his answer, admitted the execution and non-payment of the note, and that it was given for part of the price of the land, but resisted any recovery thereon, on the alleged grounds that said C. G. Land, who was bound by his warranty of title in the deed, was insolvent, and that the title to the land was defective, and was known to be so by Land when he sold the land to the defendant; the land being embraced by a conveyance to Land from the executors of Samuel D. Baird, deceased, who derived his claim by an imperfect and defective conveyance from Samuel Chew's heirs, some of whom were entitled to recover a portion of the land. The answer suggests the names of Chew's heirs and their respective interests in the land, and prays the court to compel the plaintiffs to perfect the title before adjudging payment of the debt in controversy; and for that purpose it is made a cross-petition against the plaintiffs, but not against Chew's heirs, nor does the defendant seek a rescission of the contract.

The cross-petition was substantially controverted by a reply filed by Lockridge.

A trial of the cause resulted in a judgment for the plaintiff, from which this appeal is prosecuted. The pleadings present no sufficient issue of mistake or fraud in the execution of the contract, nor is there evidence of either to entitle the appellant to relief on that ground; and he not only failed to ask a rescission of the contract, but elected of record to retain the title; but the only substantial relief sought was, that the court would, in effect, enjoin the payment of the note in controversy until the plaintiff should perfect the title.

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It is well-settled, as a general rule, that a purchaser who has received a conveyance, and has thereby acquired a sufficient legal remedy by proceeding on the vendor's warranty, whenever evicted, cannot resist the payment of a balance of the purchase money on the ground of defects in the title, although, as correctly said by this court in *Simpson, &c., vs. Hawkins, &c.* (1 *Dana*, 303), if the warranty of title has been broken so as to entitle the vendee to damages, or if the vendee be entitled to damages upon a covenant of seizin, he may apply to the chancellor, *where the vendor is insolvent*, to set-off those damages against the unpaid purchase money. It is said, "that the ground upon which the chancellor interferes in such cases is the prevention of the irreparable mischief which otherwise might result from the insolvency."

Waiving the objection, that in this case no distinct claim of damages is asserted as a set-off to the note, the evidence, although conflicting as to the alleged insolvency of Land, fails, as we think, to sufficiently establish that fact, which, in any aspect of the case, is essentially necessary to entitle the appellant to any equitable relief in this case.

It is true the deed of assignment to Lockridge authorizes the inference that Land was insolvent at the time it was made, but that was before the deed of Land and wife to the appellant was made and adopted, and nearly ten years before this suit was brought; and the appellant has failed to show that, since he accepted Land's deed, and apparently elected to rely on the warranty therein, Land's pecuniary circumstances have so changed as to increase the reasons which then existed for doubting his solvency and responsibility on his warranty.

Wherefore, the judgment is affirmed.

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CASE 31—PETITION ORDINARY—JANUARY 14.

Hamblin vs. McCallister.

APPEAL FROM SHELBY CIRCUIT COURT.

1. Written notice by a surety in a note to sue at the next term of the court may be waived, and a verbal notice may be accepted by the holder of the note, with the same effect as if it had been in writing.
2. The surety answered plaintiff's petition, and alleged that he was surety only in the note sued on, and that, after the note became due, he gave the plaintiff oral notice to sue at the next term of the court, and at the same time "offered to give a written notice; but the plaintiff waived a written notice, saying, 'I do not require a written notice; I waive a written notice; a verbal notice is all that is necessary.'" The plaintiff having delayed suit for several terms of the court—*Held*—That the circuit court erred by sustaining a demurrer to the answer, and that it presented a good plea in exoneration *of the surety*.

A. G. ROBERTS, For Appellant,

CITED—

14 *B. Mon.*, 8; *Nichols vs. McDowell.*
Civil Code, sec. 74.

HARWOOD & CARPENTER and
S. E. DEHAVEN, For Appellee,

CITED—

14 *B. Mon.*, 8; *Nichols vs. McDowell.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

In this action by the appellee against the appellant and W. M. Gibson, on their joint note for money, the appellant, seeking exoneration, alleged in his answer that he was only Gibson's surety, and that, shortly after the note became due, he gave the appellee an oral notice to sue

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at the next term of the court, and, at the same time, "offered to give a written notice; but the plaintiff waived a written notice, saying, 'I do not require a written notice; I waive a written notice; a verbal notice is all that is necessary.'"

The circuit court sustained a demurrer to the answer, and rendered judgment against the appellant for the debt.

The facts, as alleged in the answer and admitted by the demurrer, constitute an available defense in bar of the action against the appellant.

Although the statute under which the appellant seeks exoneration prescribes a written notice, yet such notice, in permanent form, is only required for the benefit and security of the obligee against mistakes and subornation. But this legal privilege of requiring written evidence of the notice may be waived by accepting an actual notification without writing, and thus lulling the surety by expressly dispensing with a written form, which could not in fact have given any more information. Had the appellee been silent, or had he objected to the verbal notice, the appellant could not make any other than a written notice available, as the statute entitled the appellee to require it; but the appellee not only waived his right to require a written notice, *but expressly accepted the verbal notice as equally satisfactory and effectual;* and he thereby prevented the appellant from giving the notice in writing, which he would undoubtedly have otherwise done, and thereby have either precipitated a prompt suit against the principal, or secured his own exoneration in the event of a failure to bring any such action.

If, then, the answer be true, as it must be assumed to be until denied, the appellee is estopped to deny that the notice thus given and accepted was legal and sufficient

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for the appellant's discharge by the failure to sue for several terms after the appellee was warned to sue. To allow him to take such an advantage of his own act would be a fraud on the appellant and a wrongful perversion and abuse of the statute.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent with the foregoing opinion.

CASE 32—PETITION ORDINARY—JANUARY 14.

Hicks & Gill vs. Doty.

APPEAL FROM GARRARD CIRCUIT COURT.

A contract to pay a stipulated sum of money for the rent of a house and lot, and also to make certain improvements therein specified, *is not assignable in law so as to vest the assignee with a right to sue in his own name alone.* The assignor is a necessary party plaintiff or defendant. (*Sec.* 6, *chap.* 22, *Revised Statutes*, 1 *Stanton*, 268; *Marcum, &c., vs. Hereford*, 8 *Dana*, 1.) The assignee being the equitable holder, the assignor still holding the legal title, each is an essential party. (*Gill vs. Johnson*, 1 *Met.*, 449; *Lytle vs. Lytle*, 2 *Met.*, 127.)

GEO. R. MCKEE, For Appellants,

CITED—

14 *B. Mon.*, 86; *Hill vs. Barrett.*

14 *B. Mon.*, 254; *Collins vs. Blackburn.*

2 *Met.*, 89; *Riggs, &c., vs. Maltby & Co.*

7 *J. J. M.*, 216; *Wood & Harden vs. Kendell, &c.*

2 *Blackstone*, 305.

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Act of 1798, *B. & M., p.* 150.
Revised Statutes, sec. 6, *chap.* 22.
2 *Bibb*, 233; *Bowman vs. Frooman.*
3 *Bibb*, 441; *Crag vs. Miller.*
5 *J. J. M.*, 42–3; *Boyd vs. Rumsey.*
7 *B. Mon.*, 547; *White vs. Buck.*
2 *Met.*, 128; *Lytle vs. Lytle.*

NOEL, OWSLEY & BURDETT, For Appellee,

CITED—

2 *Parsons on Contracts*, 29.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The appellants leased a house and lot from J. H. West, and entered into a written contract agreeing to pay therefor one hundred and twenty-five dollars, January 1, 1868, and to do certain improvements therein specified, West reserving the use of the stable and its appurtenances then on the lot, and to have certain specified improvements made. West assigned said covenant to Bush, who assigned it to Doty, the appellee, by written indorsements. Doty, as assignee, brought suit in his own name without joining West as co-plaintiff, or making him a defendant, describing it as a promissory note for one hundred and twenty-five dollars.

The defendants demurred—

1. Because the plaintiff was not the owner of the premises, and there was no contract between the plaintiff and defendants.

2. Because the covenant is not assignable.

3. Because the plaintiff has no legal interest in, nor authority to sue on, the covenant.

4. Because the petition does not show any authority in the plaintiff to demand judgment nor legal cause of action.

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5. Because the proper parties are not made.

6. Because the covenant filed is not properly set out in the petition.

7. Because the covenant filed is not the one described in the petition.

By section 6, chapter 22 (1 *Rev. Stat.*, 268), "all bonds, bills, or notes for money or property, shall be assignable, so as to vest the right of action in the assignee," which is a literal transcript from the previous statute, and which had often been adjudicated as embracing only writings for *money* or *property*, and not such as contained covenants for other things, such as furnishing a slave with clothes, or for improving the leased premises, which were mere personal covenants. And in *Marcum et als. vs. Hereford* (8 *Dana*, 1), this court held, that a covenant to pay a given sum as rent, and to move a house, was a covenant for personal services as well as for the payment of money, and, therefore, not assignable "*so as to pass the legal title to the assignee*," and reversed a judgment in the assignee's favor.

By section 30, Civil Code, "every action must be prosecuted in the name of the real party in interest, except as provided in section 33, which does not embrace mere assignees of notes, bonds," &c.

Whilst, as decided by this court in *Gill vs. Johnson* (1 *Met.*, 449), *and Lytle vs. Lytle* (2 *Met.*, 127), the assignee being the equitable holder when the assignment did not pass the legal title, was a proper and essential party; yet the payee, though he had so assigned, still holding the legal title, was also an essential party, either as co-plaintiff or a defendant.

The demurrer being overruled, an exception thereto presents a reversible error, as where a defect of parties apparent in the record is a legal cause of demurrer;

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although the description of this covenant in the petition, being merely as a promissory note, is quite inaccurate, yet, as it was filed, had it been assignable so as to pass the legal title, we might not have reversed. For that reason alone the judgment is reversed, with directions for further proceedings as herein indicated.

CASE 33—ATTACHMENT FOR RENT—JANUARY 14.

Thompson vs. Marsh.

APPEAL FROM BOURBON CIRCUIT COURT.

1. The mere fact that a tenant remains in possession after the expiration of his lease cannot be construed into a refusal to deliver possession. (*Shepherd vs. Thompson*, 2 *Bush*, 176.)
2. A judgment for double rent is unauthorized when the evidence fails to show that there was a demand, and a refusal to restore the possession of the premises, after the termination of the lease, or some act of the tenant equivalent to an express refusal. In this case, such a judgment is reversed, although no exceptions were taken to certain rulings of the circuit court which are inconsistent with the conclusions of this opinion.

JOHN A. PRALL, For Appellant.

CITED—

Revised Statutes, 2 *Stanton*, 92.
Chitty's Pleadings, 405.
13 *Johnson's N. Y. R.*, 428; *Bigelow vs. Johnson.*
2 *Bibb*, 225; *Bess vs. Shepherd.*
4 *B. Mon.*, 373; *Stuart vs. Smith.*
Archbold's Nisi Prius, 49*th Law Library*, 254.
2 *Bush*, 176; *Shepherd vs. Thompson.*

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KINKEAD & BUCKNER, For Appellee,

CITED—

Revised Statutes, secs. 6, 7, *chap.* 56, 2 *Stanton*, 91, 92.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

This was a proceeding by attachment against the property of the appellant, under the 5th section of article 2 of chapter 56 of the Revised Statutes, for the recovery of one thousand dollars, claimed by the appellee in his affidavit, for the rent of a house and lot.

The attachment having been levied and returned to the circuit court, as directed by law, for adjudication thereon, the defendant appeared and filed an answer, controverting the claim, and a trial of the case resulted in a verdict and judgment for the plaintiff for eight hundred and thirty-five dollars, from which this appeal is prosecuted.

It appears that the defendant became the tenant of the plaintiff's intestate, Thomas K. Marsh, about the first day of March, 1866, under a contract by which he agreed to pay said Marsh five hundred dollars, as rent for the leased premises, for a term ending on the first of March, 1867, and that he subsequently paid the five hundred dollars. And it further appears, that he remained in possession after the expiration of the lease, without any express contract as to the payment of rent, until the 26th of February, 1868, when the attachment was sued out.

There is no evidence to authorize the conclusion that a reasonable rent of the property for the time the defendant occupied it, after the termination of his lease, would have exceeded five hundred dollars. It is obvious, therefore, that the sum assessed by the jury was excessive and unauthorized, unless the defendant, by holding over, ren-

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dered himself liable for double rent, as was contemplated by the instructions of the court.

This increased and apparently punitive responsibility of tenants is imposed by the sixth and seventh sections of the first article of chapter fifty-six of the Revised Statutes, by which it is restricted to the following cases: 1st. That of a tenant who, having given notice of his intention to quit possession of the premises held by him, shall not accordingly do so; 2d. That of a tenant whose term is to end at a certain time, who *refuses* to deliver possession when his term expires; and, 3d. That of a tenant who, having entered under a special agreement that no notice was to be given, *refuses* to deliver possession when it is *demanded*.

As in this case the tenancy was, by contract, terminated at a particular time, the essential question is, did the appellant refuse to deliver possession when his term expired?

This court has decided that the mere fact that a tenant remains in possession after the expiration of his lease, cannot be construed into a *refusal* to deliver possession. (*Shepherd vs. Thompson*, 2 *Bush*, 176.) There is no evidence in this case of a demand and refusal to restore the possession of the premises after the termination of the lease, nor of any such act on the part of the appellant as should be regarded as equivalent to an express refusal. It is stated in the bill of exceptions that the record of a traverse case between the parties was read to the jury; but it is not embodied in this record, and the bill of exceptions does not show what fact, if any, was proved by its production as evidence.

It seems to us, therefore, that the recovery of double rent was not authorized by the evidence; and for this reason the judgment must be reversed, although no ex-

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ceptions were taken to certain rulings of the court, which are inconsistent with the conclusions of this opinion.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

CASE 34—PETITION EQUITY—JANUARY 15.

Goldburg and wife vs. Drabelle.

APPEAL FROM LOUISVILLE CHANCERY COURT.

When a deed of trust, vesting separate property in a married woman, expressly authorizes its subjection by her creditors, any one of her creditors has a right to avail himself of that liability for satisfying his own demand, without alleging that he was the only creditor, or making other creditors, if any, parties.

LEWIS N. DEMBITZ, For Appellant,

CITED—

4 *Paige*, 23; *Wakeman vs. Grover.*

23 *Pickering*, 508; *Bryant vs. Russell.*

Rev. Stat.—"*Husband and Wife*"—*art.* 4, *sec.* 17.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The deed of trust vesting in Mrs. Goldburg separate property in the store kept by her, expressly authorized the subjection of it by her creditors; and of that liability any one of her creditors had a right to avail himself for satisfying his own demand, without either alleging that he was the only creditor, or making other creditors, if any, parties; but it does not appear that there were

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other creditors. Nor does the 17th section of article 4 of chapter on Husband and Wife, Revised Statutes, apply to the case.

Wherefore, the judgment of the chancellor subjecting, without answer, Mrs. Goldburg's trust property to sale for paying her debt to the appellee, is affirmed.

CASE 35—INDICTMENT—JANUARY 15.

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Henry vs. Commonwealth.

APPEAL FROM HARRISON CRIMINAL COURT.

1. An order of the court abating an indictment on motion of the Attorney for the Commonwealth, although superinduced by the mistaken belief that the defendant was dead, was a termination of the prosecution on said indictment, and it could not be reinstated on the docket as a pending indictment against such defendant. This indictment having been reinstated on the docket, there was no prosecution pending against the defendant. Being arrested, the defendant was not legally in custody, charged with a public offense; and having given a bail bond, his sureties are not liable for his non-appearance.
2. It is essential to the validity of a recognizance or bail bond that it may be made to appear that the defendant was, when recognized or bailed, legally in custody, charged with a public offense, and was discharged therefrom by reason of the giving of the bond or recognizance, and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for an examination of the charge, or before a court for the trial thereof. (*Criminal Code, sec.* 80.)
3. A recognizance or bail bond is defective for the reason that it cannot be ascertained from it, that the bail undertook, that the defendant should either appear before a magistrate for examination of any charge, or before the court for trial thereon.

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Henry vs. Commonwealth.

A. H. WARD, For Appellant.

JOHN RODMAN, Attorney General, For Appellee.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

In May, 1863, an indictment for horse-stealing was found in the Harrison circuit court against John Jones and Ambrose Barnett, and afterwards, on the 3d day of May, 1864, neither of the defendants having been arrested, the following order was made: "On motion of plaintiff by attorney, and the death of defendant Jones being suggested, it is ordered that this suit abate as to said Jones; and as to the defendant Barnett, this cause is filed away with leave."

In November, 1865, the case was, by direction of the Commonwealth's Attorney, reinstated on the docket; and Jones not being dead, as had been incorrectly suggested, he was arrested and held to bail to answer the indictment; and in May, 1866, the following recognizance was taken by the court:

"On motion of defendant, John Jones, he is permitted to renew his recognizance; and, thereupon, said defendant, and Dudley Jones and Lewis M. Henry, as sureties, acknowledge themselves bound to the Commonwealth of Kentucky in the sum of five hundred dollars, to be void if said defendant Jones shall make his appearance in the criminal court of this county on the first day of its next September term, and not depart without leave."

It appears from the bill of exceptions that Jones was in court at the September term, 1866, and obtained the permission of the court to go to another county for absent witnesses; but no formal disposition was made of his case at that term; but at the next term of the court he failed to appear, and for this a forfeiture of the recog-

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nizance was ordered, and a summons thereon awarded against his sureties.

The appellant appeared and answered the summons, and the law and facts of the case being tried by the court, a judgment was rendered against him for five hundred dollars, and he now seeks a reversal of that judgment in this court.

The order of abatement, although superinduced by the mistaken belief that Jones was dead, was a termination of the prosecution on said indictment, so far as he was concerned, and it could only be reinstated on the docket as a pending indictment against Barnett.

It is essential to the validity of a recognizance or bail bond that it may be made to appear that the defendant was, when recognized or bailed, legally in custody, charged with a public offense, and was discharged therefrom by reason of the giving of the bond or recognizance, and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for an examination of the charge or before a court for the trial thereof. (*Criminal Code, sec.* 80.)

When the recognizance was taken, there being no prosecution pending against Jones, it cannot be said that he was legally in custody, charged with a public offense. It is, moreover, apparent on the face of the recognizance that it is defective, for the reason that it cannot be ascertained from it that the bail undertook that Jones should either appear before a magistrate for the examination of any charge, or before the court for trial thereon.

Wherefore, the judgment, being deemed erroneous, is reversed, and the cause remanded, with directions to dismiss the proceeding.

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CASE 36—RULE—JANUARY 16.

Bates, &c., vs. Foree, &c.

ON RULE AGAINST THE LATE CLERK OF THE OWEN CIRCUIT COURT.

1. Clerks of courts cannot, by contract, charge for making out copies or transcripts of records in their offices, more than the fees allowed by law. Public policy will not permit such contracts.
2. A clerk of a court will not be compelled to surrender a transcript of a record, which was partly made out before and completed by him after the expiration of his term of office. *In this case the clerk refused until he should be paid an agreed price.*
3. If a clerk refuses or unreasonably delays making out complete transcripts of the records in his office when so required by litigants, they have a remedy against him on his official bond.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

On this rule against W. H. Sandford, late clerk of the Owen circuit court, to show cause why he refuses to deliver the transcript of the record in this case, his written response and oral statement under oath have been considered.

The suit was tried below and the transcript of record ordered and actually begun, and some ninety pages made when his term of service would soon expire and his successor be qualified; and finding that the record was very voluminous and troublesome, he notified appellants' counsel he could not complete the record within his unexpired term, nor for the legal fees; when the counsel agreed, for his client, to give him reasonable compensation. Some two to three hundred pages were transcribed when he went out of office. His successor entered upon the dis-

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charge of his duties the first Monday in September, and the record was not completed until in the following October, when the counsel fixed the compensation at two hundred dollars, and Sandford lodged the transcript in his agent's hands, with directions not to deliver it until appellant paid the two hundred dollars, which is only about twenty-five dollars more than he says the legal fees would be, as these would amount to about twenty-five cents per page, and there being some seven hundred and forty-two pages.

Whilst we see no improper motive, and only the exercise of what Mr. Sandford believed his legal rights, and which seemed to have been conceded by the appellant's attorney, yet we are constrained to differ from them.

It is a part of the official duties of clerks to make out complete and perfect transcripts of record for parties litigant, and the law has defined and regulated his fees therefor. It is true he is to be allowed a reasonable time to discharge this as well as his other official duties, and if he cannot accomplish this within his term, then its completion devolves upon his successor, as part of his official duties.

The parties litigant are entitled to a perfect transcript from the clerk, whoever he may be, for this is an incident which follows the office, which never dies nor ceases, and at the compensation fixed by law, to be collected in the legal mode; therefore, any promised compensation beyond what the law has provided is without consideration, and against its policy.

If promised compensation for extraordinary official vigilance should be recognized, the liberal and the wealthy would get innumerable advantages over those not disposed or not able to pay additional remuneration, and that equality, so just in itself, and the subject of so much

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legal solicitude, manifested in all our laws regulating official duties, would be destroyed. It would open the door to innumerable evils, and be instrumental in much injustice, controvene the pure and impartial policy of the law, and result in a harvest of calamity to a large class of litigants.

Whilst we do not mean to say that the clerk might not retain the record to secure his legal fees, where it is manifest that he could not collect them by legal means and remedies, yet no such cause is here assigned; but as this transcript was not, nor could reasonably be, completed by Sandford before the expiration of his term of office, compatible with his other official duties, he holds this transcript as personal, individual property, unencumbered with official relation or responsibility as to its delivery after completion; and, therefore, whilst he would not now have the legal right to charge for the first two hundred pages more than the law allows, yet he may retain the whole until an agreed price is paid—the remainder being made when out of office, and under no official responsibility, and the party being under no legal obligation to accept a partially completed record. The party may have a complete transcript made by the present encumbent at the legal rates, and if Sandford unnecessarily or unreasonably delayed making out his transcript, he has ample legal remedies on Sandford's official bond; but this court cannot order a delivery of the transcript.

Rule dismissed.

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CASE 37—PETITION EQUITY—JANUARY 16.

Robinson, &c., vs. Johnson, executor of Polly Ficklin, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

"In regard to the real estate placed in the hands of my executor and trustees for the benefit of my emancipated negroes, I direct that none of said negroes shall have a right to sell their interest in the same; and upon any one attempting such sale, or upon any one or more moving off, the whole property shall remain for the use of the others; nor shall said property be sold by said trustees unless it should become unlawful for colored free persons to remain in the State, when said trustees shall be authorized to sell the property and apply the proceeds towards establishing them in a new home elsewhere." *Held*—That the land referred to, in the above clause of the will, was designed for community property for all the beneficiaries, so long as they could lawfully remain thereon, without any power of sale in them, and a forfeiture for any attempted sale, and also that the circuit court rightfully dismissed a petition for the sale and partition of the land.

HUSTON & MULLIGAN, For Appellants,

CITED—

Civil Code, sec. 543.

Revised Statutes, sec. 1, *art.* 3, *chap.* 86.

M. C. JOHNSON, For Appellees.

[Brief not in records.]

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The sixteenth clause of testatrix's will is as follows:

"In regard to the real estate placed in the hands of my executor and trustees for the benefit of my emancipated

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negroes, *I direct that none of said negroes shall have a right to sell their interest in the same; and upon any one attempting such sale, or upon any one or more moving off, the whole property shall remain for the use of the others; nor shall said property be sold by said trustees unless it should become unlawful for colored free persons to remain in the State, when said trustees shall be authorized to sell the property and apply the proceeds towards establishing them in a new home elsewhere.*"

This land was evidently designed by the testatrix to be a home and community property for all the beneficiaries so long as they could lawfully remain thereon, without any power of sale in them, with a forfeiture of their rights as a penalty for any attempted frustration of such design by an offer to sell. The only persons authorized to sell were her executors or the survivor, and that on the sole contingency that the law of the State should no longer permit the beneficiaries to enjoy the bounty by residing thereon.

So far from there being now any legal frustration of the testatrix's will and devise, the beneficiaries are better protected in their enjoyment, both by Federal and State law, than at the time of her decease. It would, therefore, be singularly inconsistent to make this doubly legal assurance of her desires a cause to frustrate her purposes.

The circuit judge was then eminently right in dismissing the petition seeking a sale and partition of said property. None need take or enjoy this bounty longer than it subserves their purpose and interest in the manner designated by the testatrix; but the court should not violate her express directions.

Wherefore, the judgment is affirmed.

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CASE 38—PETITION FOR DIVORCE—JANUARY 18.

Cravens vs. Cravens.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. During the pendency of a suit for a divorce by the wife, who has abandoned her husband, whether she is entitled, *pendente lite*, to an allowance against him for the maintenance of herself and child, essentially depends on the reasonableness or unreasonableness of her abandonment and refusal to return. But as this can only be decided on the final hearing, some allowance in the meantime may be proper.
2. The annual income of the husband appears to be about one thousand dollars for the support of himself and two children. In the suit of his wife for a divorce, a *pendente lite* allowance and charge against him of seven hundred dollars for the maintenance of herself and child a year is unreasonable and exorbitant. The maximum shown by the evidence to be needful was five hundred dollars. The allowance is reduced to that sum.
3. Compensation to the wife's counsel in her suit for divorce is an ulterior question, which cannot be provided for, *pendente lite*, and should not be anticipated in making temporary provision for her support, for which alone the statute authorizes any such allowance.

KINKEAD & DARNELL and
PORTER & GREATHOUSE, For Appellant,

CITED—

Civil Code, secs. 15, 876; 15 *B. Mon.*, 48.
4 *Dana*, 307; *Boggess vs. Boggess.*
2 *Kent's Com.*, 146; 1 *Duvall*, 197; *Lee vs. Lee.*
8 *B. Mon.*, 120; *Griffin vs. Griffin.*
MSS. Opin., Sept., 1857; *Taylor vs. Taylor.*
2 *Met.*, 414; 3 *Met.*, 303.
4 *Paige*, 643; *Germond vs. Germond.*
3 *Paige*, 267; *Lawrence vs. Lawrence.*

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1 *Duvall*, 198; *Quisenbury vs. Quisenbury*
4 *Littell*, 205; *Butler vs. Butler*.
Rev. Stat., *sec.* 6, *art.* 3, *chap.* 47, *and sec.* 32, *chap.* 25.
3 *Edw. Ch'y R.*, 317; *Worden vs. Worden*.
1 *Harr. Ch'y R.*, 144; *Boyd vs. Boyd*.
4 *Dana*, 30; *Lockridge vs. Lockridge*.

KINKEAD & BUCKNER and
W. C. P. BRECKINRIDGE, For Appellee,

CITED—

Revised Statutes, *secs.* 6, 7, *art.* 3, *chap.* 47.
5 *B. Mon.*, 47; 3 *Met.*, 32; *Bondurant vs. Apperson*.
Civil Code, *sec.* 15; 3 *Blackstone*, 398.
1 *Bouvier*, 525; 2 *Ib.*, 385, 659, 678, 679.
Barton's Suit in Equity, 148.
4 *Met.*, 236; *Applegate vs. Applegate*.
4 *Met.*, 109; *Hanson vs. Bowyer*.
17 *B. Mon.*, 144; *Overby vs. Gay*.
Bishop on Marriage and Divorce, *secs.* 603, 604, 612, 608, 569, 581, 590.
4 *Paige*, 645; 3 *Paige*, 267; 4 *Littell*, 250.
1 *Duvall*, 197; 4 *Met.*, 413; 3 *Met.*, 303.
2 *Littell*, 337; 4 *Littell*, 252; 4 *Dana*, 307.
8 *B. Mon.*, 50, 120, 178; 4 *Eng.* (*Ark. R.*), 507.
17 *Serg.*, 139.
5 *Halstead*, *N. J.*, 355; *Bray vs. Bray*.
4 *Sanford*, *N. Y.*, 373; *Lynde vs. Lynde*.
1 *Barb.*, *N. Y.*, 241; *North vs. North*.
3 *Barb.*, *N. Y.*, 628; *Williams vs. Williams*.
2 *Md. Ch'y Dec.*, 335, 341, 393.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Each of the parties in this case being peculiarly irascible and signally imprudent, they had cohabited nearly

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eight years as husband and wife, discordantly and unhappily, when, having three children, the appellee abandoned her appellant husband, and, rejecting overtures for a reunion, she sued him for a divorce *a vinculo*. That suit is still pending, and its final result cannot be foreseen.

On the appellee's motion, the circuit court charged the appellant for the maintenance of herself and child (the appellant retaining the other two children) seven hundred dollars for one year, payable in several installments, and he appeals from that judgment.

Whether the appellee was entitled, *pendente lite*, to any allowance, might essentially depend on the reasonableness or unreasonableness of her abandonment and refusal to return. But, as this can only be decided on the final hearing, some allowance in the meantime may be proper; but the amount allowed is unreasonably exorbitant. The *maximum* shown by the evidence to be needful is five hundred dollars; and the appellant's annual income for the support of himself and two children appears to be only about one thousand dollars.

Compensation to the appellee's counsel is an ulterior question, which cannot now be provided for, and should not be anticipated in making temporary provision for the appellee's support, for which alone the statute authorizes any such allowance.

It is, therefore, quite clear that too much was allowed in this case. The allowance should not exceed five hundred dollars, and might not unreasonably be less.

Wherefore, the judgment is reversed, and the cause remanded.

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CASE 39—PETITION EQUITY—JANUARY 18.

Mary C. Hunter vs. Duvall, Ketchum & Co.

APPEAL FROM LOUISVILLE CHANCERY COURT.

A married woman purchased goods and gave her own notes for the price, and after the death of her husband refused to deliver them to his administrator, claiming them as her own separate property. *Held*—That if she intended to repudiate the contract and avoid the notes by reason of her coverture, which she could do, she should have surrendered the goods to her vendors; but that, by refusing to deliver the goods to the administrator of her husband, she rendered herself liable for the payment of their value. Judgment of the chancellor against her for the price agreed upon, and interest from the maturity of the notes, is affirmed.

J. W. STEVENSON and
PIRTLE & CARUTH, For Appellant,

CITED—

2 *Bush*, 161; *Rawlings' ex'r, &c., vs. Landes.*
7 *B. Mon.*, 334; *Breckinridge vs. Coleman.*
10 *B. Mon.*, 321; *Coleman vs. Woolley's ex'r.*
12 *B. Mon.*, 329; *Johnson vs. Jones.*
Revised Statutes, sec. 1, *art.* 2, *chap.* 47, 2 *Stanton*, 8.
1 *Bush*, 4; *Agnew and wife vs. Williams.*
15 *B. Mon.*, 327; *Sweeney vs. Smith.*
15 *B. Mon.*, 91; *Fetter vs. Wilson.*
2 *Bush*, 321; *Guishaber vs. Hairman.*

HARRISON & BENNETT, For Appellees,

CITED—

2 *Salk. R.*, 646; 1 *Camp. R.*, 120.
5 *T. R.*, 194; 6 *Ib.*, 451; 1 *East.*, 16.
2 *Black.*, 903; 1 *Bing. R.*, 344.

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JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

If appellant intended to repudiate the contract and avoid the notes by reason of her coverture, which she certainly could do, she should have surrendered the goods to appellees.

She selected and purchased the goods, gave her own notes for their price, and refused to surrender them to the administrator of her husband as a part of his personal estate, but claimed them as her own separate property, which she could only do in virtue of her purchase of them, as the deed of her husband to Miss Warner, in trust for her benefit, only conveyed the furniture, paintings, table ware, and other personal property that was in her house at the time of their marriage, and all the personal property purchased by her subsequent to their marriage—which expression, "*purchased by her*," should be interpreted to mean such personal property as was purchased and paid for by her.

This deed was executed after the goods were purchased from appellees, and after appellant had executed her notes for their price; and as no conveyance of the other property owned by her at their marriage was made, it is not improbable, and we feel authorized to presume, that the chief motive for making the deed was to secure these very goods to her, as she had purchased and undertaken to bind herself to pay for them.

We therefore concur with the court below in opinion, that, by refusing to surrender the goods to the administrator of decedent, J. S. Hunter, she rendered herself liable for the payment of their value, which, in absence of any proof to the contrary, should be fixed at the price which she agreed to pay for them; nor can we say that the court below erred in allowing interest on the price from the maturity of the notes.

Wherefore, the judgment is affirmed.

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CASE 40—INDICTMENT—JANUARY 18.

Lucker vs. The Commonwealth.

APPEAL FROM LOUISVILLE CITY COURT.

On the trial of an indictment for keeping a "tippling-house" in the city of Louisville, the only proof before the jury was, that spirituous liquors had been drank in the house "*more than twice*," and that the defendant had a State license to retail such liquors, and had also paid for but had not obtained, a city license. On these facts the jury was instructed in effect to find the defendant guilty. *Held*—That the instruction was erroneous, and the verdict against the defendant was not authorized by the testimony; that this court has no judicial knowledge of any ordinance requiring a city license, and no such ordinance was shown; nor did the testimony, in such a penal case, authorize the deduction that the liquor drank in the defendant's house was drank with his consent or was sold by him.

HARNEY & HARNEY, For Appellant,

CITED—

Bouvier's Law Dictionary, "*Tippling-house.*"
4 *Blackstone*, 64.
1 *Duvall*, 161; *Taylor vs. Commonwealth.*
2 *Duvall*, 90; *Pike vs. Commonwealth.*
City Charter of Louisville, *sec.* 14, *art.* 5.
18 *B. Mon.*, 35; *Ritte vs. Commonwealth.*
2 *B. Mon.*, 281; *Duncan vs. Commonwealth.*
15 *B. Mon.*; *Commonwealth vs. Allen.*
14 *B. Mon.*, 385; *Commonwealth vs. Kamp.*
2 *B. Mon.*, 296; *Commonwealth vs. Luck.*
Revised Statutes, *sec.* 3, *art.* 4, *chap.* 99.
Criminal Code, *sec.* 121.

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JOHN RODMAN, Attorney General, For Appellee,

CITED—

4 *B. Mon.*, 4; *Commonwealth vs. Turner.*

Criminal Code, secs. 335, 349, *sub-sec.* 3.

3 *Met.*, 10; *Clem vs. Commonwealth.*

1 *Met.*, 366; *Murphy vs. Commonwealth.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On the trial of an indictment against the appellant for keeping a "tippling-house" in the city of Louisville, the jury returned a verdict for sixty dollars, for which the court, overruling a motion for a new trial, rendered a judgment against him, to reverse which he prosecutes this appeal.

The only testimony before the jury was, that spirituous liquors had been drank in the appellant's house "more than twice," and that he had a State license to retail such liquors, and had also paid for, but had not obtained, a city license.

On these facts the jury was instructed, in effect, to find the appellant guilty; that instruction was erroneous, and the verdict was not authorized by the testimony. This court has no judicial knowledge of any ordinance requiring a city license, and no such ordinance was shown; nor did the testimony, in such a penal case, authorize the deduction that the liquor drank in the appellant's house was drank with his consent or was sold by him.

Wherefore, the judgment is reversed, and the cause remanded for a new trial on the indictment, which we adjudge to be substantially sufficient.

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CASE—41—PETITION EQUITY—JANUARY 19.

Davis vs. Morton, Galt & Co.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The courts of Kentucky will not abate a suit on a plea of the pendency of a prior suit, on the same debt and between the same parties, in a court of another State.
2. As between themselves the States of this Union, though integral parts of the same national sovereignty, are yet foreign to, and independent of, each other.

WM. ATWOOD, For Appellant,

CITED—

3 *McLean*, 221; *ex parte Balch.*
4 *McLean*, 535; *Hacker vs. Slevins.*
1 *Connecticut*, 154; *Hart vs. Granger.*
Civil Code, *sec.* 120, *sub-sec.* 3, *and sec.* 123.

WM. MIX, For Appellees,

CITED—

MSS. Opn., *Jan.*, 1857; *McMicken vs. Hammond.*
2 *Parsons on Contracts*, *4th ed.*, *p.* 232.
Story's Conflict of Laws, *sec.* 610, *n. a.*
9 *Johnson*, 221; *Brown vs. Seymour.*
12 *Johnson*, 99; 3 *McCord*, 38.
13 *Ills.*, 486; 5 *De. G. C. S.*, 95.
Stewart's Lower Canada R., 558.
3 *Swanst.*, 703; 2 *Curtis C. C.*, 559; 17 *Mass.*, 197.
10 *Eng. Law and Equity R.*, 250.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The appellees sued the appellant in the Louisville chancery court for the amount due by him to them as holders of a protested bill of exchange drawn by him in Memphis,

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Tennessee, and payable there, for about one thousand one hundred and sixty-six dollars, and, on the execution of the proper bond, procured process of arrest, of garnishment and attachment. Under that process the appellant was arrested, and afterwards liberated on the execution of an approved bail bond for securing the debt; and, having appeared in the suit, he answered, not controverting the debt, but urging an abatement of the proceeding, on the allegation that a suit for the same debt, and between the same parties, instituted in the municipal court of Memphis, was still pending. A demurrer to that answer was sustained, and the appellant, refusing to make any other defense, judgment was rendered against him for the amount claimed, and a capias awarded against him. Of this he complains.

It seems to us that the judgment was right.

For the prevention of unnecessary vexation, confusion, and possible injustice, the common law will not allow, if properly objected to, the prosecution of more than one suit at the same time, between the same parties, for the same cause of action, in the same court, or in different courts of the same sovereignty; and the pendency of the first may abate the last. But the same common law will not abate a suit in the *forum* of one sovereign on a plea of the pendency of a prior suit in a forum of another sovereign. The reason of this latter doctrine is two-fold —1st. Because a foreign judgment, depending on foreign law, might be unjust, and could not be enforced beyond the jurisdiction of the foreign court without a new suit on it as only *prima facie* evidence; and 2d, and chiefly, because the remedy in the country where the last suit is brought may be more adaptable and safe, and means for effectuating a judgment may be found in the latter and not in the former country. As between them-

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selves the States of this Union, though integral parts of the same national sovereignty, are yet foreign to, and independent of, each other.

Nevertheless, the Federal Constitution, and an act of Congress for effectuating its purpose of harmonious union, give to the judgments and judicial proceedings in one of these States equal effect in all the other States.

But this, though a partial, is yet not a full negation here of the common law or its reasons. The remedy may still be more effectual in one State than in another, and property liable to execution or attachment may be found in one and not in another State; and, in such a contingency, justice, which is the only object of all legal remedy, might be frustrated if a suit, which can thus be made available in one State, can be abated by the pendency of a previous suit which may be abortive, and such abatability would encourage the fraudulent removal of property from State to State for eluding all remedy.

But, moreover, the Tennessee court cannot abate the suit in Kentucky. It has no jurisdiction to do so, and, for the same reason, the Kentucky court could not abate the suit in Memphis; consequently, a refusal to abate does not deny the equal effect of the proceedings in each of these courts. In support of this position and of the judgment in this case, we need only to refer to the case of *Salmon vs. Wootton and others* (9 *Dana*, 424), and the unreported case of *McMicken vs. Hammond*, decided by this court January, 1857.

The Code of Practice concerning the pendency of one suit abating another, applies only to the same court or different courts in Kentucky, and does not touch the question we have been considering.

Wherefore, the judgment is affirmed.

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CASE 42—PETITION ORDINARY—JANUARY 19.

Inman & Carr vs. Strattan & Snodgrass.

William Inman vs. Same.

APPEALS FROM JEFFERSON COURT OF COMMON PLEAS.

1. When an attachment has been levied, and the defendant has executed bond, with security, that he "*shall perform the judgment of the court,*" as authorized by the Civil Code, sections 242, 243, the attachment is discharged by operation of law, and the obligors in the bond are bound unconditionally to perform the judgment of the court in the action, and the sufficiency of the grounds for obtaining the attachment cannot thereafter be inquired into. (*Hazelrigg vs. Donaldson*, 2 *Met.*, 445.)
2. An order of the court for a rule against the surety in a bond to "*perform the judgment of the court*" discharging an attachment levied on a steamboat, to show cause why he should not be compelled to perform the judgment of the court in the action, *is not a final order on which an appeal may be taken* to the Court of Appeals. Such appeal is dismissed for want of jurisdiction.

HAMILTON POPE, For W. S. Inman,

CITED—

Story on Partnership, sec. 432.

O. H. STRATTAN, For Appellees,

CITED—

3 *Met.*, 305; *Barbaroux vs. Waters.*
Civil Code, secs. 254, 242, 243, 290.
2 *Met.*, 445; *Hazelrigg vs. Donaldson.*
2 *Met.*, 209; *Bell vs. Western River I. and W. Co.*
4 *Met.*, 118; *Duncan vs. Wickliffe.*

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JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The appellees having brought an action against W. S. Inman, James Carr, and others, on a bill of exchange for nine hundred and forty-five dollars, on the 8th of November, 1867, sued out an attachment in the action against the property of said Inman and Carr, on the alleged ground that they were about to remove their property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiffs' claim, or the claims of the defendants' creditors; and the order of attachment was forthwith levied on the steamboat B. L. Hodge, No. 2, in which Inman owned an interest of one fourth; and, thereupon, said W. S. Inman and Wm. Inman executed the following bond in discharge of the attachment, which was accepted by the sheriff, and the boat released from the levy:

"We undertake and are bound to the plaintiffs, Strattan & Snodgrass, in the sum of nineteen hundred and ninety dollars, that the defendants, W. S. Inman and Jas. Carr, shall perform the judgment of the court.

"NOVEMBER 9th, 1869.

"WM. S. INMAN,
"WM. INMAN."

Subsequently, the defendants filed their affidavit controverting the grounds of the attachment; and the cause having progressed to a trial, the court rendered a judgment for the plaintiffs for the debt claimed by them, and, overruling a motion to discharge the attachment, awarded a rule against William Inman, the surety in said bond, to show cause why he should not be compelled to perform the judgment of the court in the action; and from said last named order said William Inman has separately appealed, and W. S. Inman and Carr have appealed from the judgment.

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The rule against William Inman is not a final order, and the appeal prosecuted by him must, therefore, be dismissed for want of jurisdiction in this court.

On the other appeal, the first inquiry is, whether the execution of the bond for the performance of the judgment of the court, under the provisions of sections 242 and 243 of the Civil Code, was not a waiver of all objections to the validity of the attachment for the insufficiency of the grounds on which it was sued out?

In *Hazelrigg vs. Donaldson* (2 *Met.*, 445), this court decided that the execution of such a bond discharged the attachment by operation of law, and rendered the obligors in the bond unconditionally bound, to perform the judgment of court in the action; and that the sufficiency of the grounds for obtaining the order of attachment could not thereafter be inquired into.

According to this construction of the legal effect of the bond, it is obvious that the appellants were concluded by it from controverting the grounds of the attachment; and as it does not appear that the judgment for the appellees was, in any respect, erroneous, it must be affirmed.

Wherefore, on the appeal of W. S. Inman and Carr, the judgment is affirmed, and the appeal of William Inman is dismissed.

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CASE 43—*AD QUOD DAMNUM*—JANUARY 20.

Morris vs. The Schallsville Branch of the Winchester and Red River T. P. R. Co.

APPEAL FROM CLARK COUNTY COURT.

A shanty, put up and occupied for the sole purpose of preventing the condemnation of a stone quarry, and not in good faith for a dwelling-house, will not entitle the owner to the exemption of quarries within two hundred yards of a dwelling-house, as provided in chapter 103 of the Revised Statutes. (2 *Stanton*, 436.) But to entitle the owner to this exemption, the house must have been erected for the sole purpose of being used as a dwelling-house, and for no other purpose, or converted, in good faith, into a dwelling-house.

JOHN B. HUSTON and
JAMES SIMPSON, For Appellant,

CITED—

Revised Statutes, 2 *Stanton*, 449.

B. F. BUCKNER, For Appellee,

CITED—

Civil Code, *secs.* 822, 903, 766, 369, 371, 372.
Revised Statutes, *chapter* 103.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The statute concerning turnpike and plank roads (*ch.* 103, *page* 436, 2 *Stanton's Revised Statutes*), and authorizing the condemnation of land, rock quarries, and other materials for construction, provides, in the 37th section, that "no quarry shall be condemned within two hundred yards of any dwelling-house, or so near to any garden, orchard, or spring as materially to impair the value of the same."

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The appellee proceeded, in the mode prescribed by its charter, to condemn, for the use of its road, a rock quarry of the appellant, who, anticipating its object, had, before its complete organization, placed on his land, within the prohibited distance from the quarry, a small and fragile house, without a chimney, and leased it to a tenant, who, after a short occupancy, finding it, as may be presumed, not comfortably habitable, left it, when the appellant put up a temporary chimney, and had the house occupied by free negroes, who were in it at the time of the inquisition on the writ of *ad quod damnum*. The inquisition, assessing damages, was traversed, and, on the trial of the traverse, the county judge instructed the jury, that, unless the house was built "in good faith" for a dwelling-house, its location did not protect the quarry from condemnation for the use of the turnpike, and the jury thereupon confirmed the inquisition, and the court gave judgment of condemnation.

The whole legislative intent is not clearly defined by the statute. We are satisfied, however, that the principal object was to prevent annoyance to the domicil, and that it is not material whether the owner or his tenant dwells in it; but we are also satisfied, that, to entitle the owner to the statutory exemption, the house, humble and fragile though it may be, must have been erected for the purpose of being used as a dwelling-house, and for no other purpose, or that it was converted, "in good faith," into a dwelling-house; and, therefore, as in this case the facts authorized the deduction that the "*shanty*" was put up and occupied for the sole purpose of preventing the condemnation of the quarry, and not "in good faith" for a dwelling-house, the instruction to the jury was right, and their finding proper.

Wherefore, the judgment appealed from is affirmed.

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CASE 44—PETITION ORDINARY—JANUARY 22.

Hill and Bergen vs. Harris.

APPEAL FROM MADISON CIRCUIT COURT.

1. "JUNE 22d, 1868.

"Mr. Harris: We, the trustees, notify you that we desire you to discontinue the Forest Hill school, from the fact of your price being too high, and through the common rumor of the children.

"WM. J. BERGEN,
"ELBA HILL."

Harris was employed to teach four months, at forty-five dollars per month, by the district trustees, Willis, Bergen, and Hill. On the receipt of the above notice, after teaching about three weeks faithfully and satisfactorily, according to the testimony, Harris retired from the school, and brought this action of tort for damages for wrongful ejection from the school, and on the general issue recovered a verdict of the jury and judgment of the circuit court for one hundred and eighty dollars damages. *That judgment is affirmed.* One hundred and eighty dollars was full pay for four months. In this action of tort, Willis would have been an improper party.

2. This is of that class of cases in which readiness to perform is not equivalent to full performance; and there is neither direct allegation nor explicit proof of special damage resulting from loss of character or of other employment; *but the peculiar and disparaging tone of the notice,* and the absence of proof or presumption of any other vacant school, authorized the jury to presume on a loss both of character and time.

S. TURNER, For Appellants,

CITED—

Civil Code, sec. 53.
2 *Bibb*, 215; *Langford vs. Owsley.*
Sedgwick on Damages, p. 108.
1 *Duvall*, 262; *Whittaker vs. Sandifer.*
6 *Dana*, 352; *Chamberton vs. McCallister.*

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BURNAM & CAPERTON, For Appellee,

CITED—

15 *Mess. & W.*, 117; *Alder vs. Keighley.*
Sedgwick on Damages, p. 212.
Littell, S. C.; Caldwell vs. Reed.
6 *Dana*, 352; *Chamberton vs. McCallister.*
14 *Vermont*, 311; 1 *Denio*, 317.
Chitty on Contracts, 684; 15 *Mo.*, 175.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On the 23d of May, 1868, D. B. Willis and the appellants, Elba Hill and W. J. Bergen, trustees of the Forest Hill school district, in Madison county, Kentucky, employed the appellee, Lewis C. Harris, to teach a school for four months, at the price of forty-five dollars a month. The appellee forthwith commenced teaching in the school-house of that district. After teaching about three weeks, *faithfully and satisfactorily, according to the testimony*, the appellants alone—their co-trustee, Willis, dissenting—gave him the following notice:

"JUNE 22d, 1868.

"Mr. HARRIS: We, the trustees, notify you that we desire you to discontinue the Forest Hill school, from the fact of your *price being too high, and through the common rumor of the children.*

"WM. J. BERGEN,
"ELBA HILL."

The appellee accordingly retired, without delay, and brought this action of tort for damages for wrongful ejection from the school. The jury, on a general issue, assessed the damage at one hundred and eighty dollars, and the circuit court, overruling a motion for a new trial, rendered judgment for the amount so assessed.

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As the action is not on the contract, but is only for a tortious violation of a right resulting from it, Willis, who did not participate in the alleged wrong, but opposed it, was not a necessary, but would have been an improper, party.

There was no available error in either giving or refusing instructions; and the only doubtful question remaining for consideration, is on the alleged exorbitance of the verdict.

The amount assessed is as much as the appellee would have been entitled to had he taught the school the entire term of four months. And this case is of that class in which offer or readiness to perform is not equivalent to full performance; and there is neither direct allegation nor explicit proof of special damage resulting from loss of character or of other employment. But the peculiar and disparaging tone of the notice, and the absence of proof or presumption of any other vacant school, authorized the jury to presume on a loss both of character and time. Then, even though the evidence did not establish anything like a mathematical standard for fixing a precise rate of damage, yet this court cannot, on any definable ground, judicially determine that the verdict and judgment were erroneous. We ought rather to presume that both are right.

Wherefore, the judgment is affirmed.

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CASE 45—PETITION EQUITY—JANUARY 22.

Loud vs. Loud, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. After the wife had permanently abandoned her husband and his home, the husband and wife, together with a third party as her trustee, entered into articles of separation, which was duly acknowledged for record by the husband, and also by the wife and her trustee. In these articles it was recited that she had voluntarily abandoned him "*without legal cause to authorize either dower or alimony*," which recital was justified by the evidence in the case, and it was then stipulated that he should pay her three hundred dollars, and furnish her with a brick house, &c., &c., during her "chosen isolation." After the death of the husband, without devising any thing to her, she made a deed of release within the year as provided in section 7, chapter 47, Revised Statutes, and asserted her claim to dower in his estate. *The judgment of the circuit court refusing dower is affirmed.*
2. The right of a wife to relinquish a jointure and claim dower in her husband's estate within twelve months after his death, as provided in section 7, chapter 47, Revised Statutes (2 *Stant.*, 26), does not embrace articles, contracts, and jointures entered into between separated husband and wife, to settle existing causes of litigation, and peaceably accomplish by private contract what could be obtained by a costly and vexatious litigation.
3. Articles of separation being entered into with a trustee consenting for the wife, in which the husband provides for her as well, or perhaps better, than the court would compel him, in consideration of which she relinquishes right of dower and distribution in his estate, and the parties continue to act upon this until the husband dies, it is too late for her to complain or seek to repudiate the provision made for her, and demand dower and distribution. *See opinion for an extended recital and review of authorities on questions involved in this case.*

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HUNT & BECK and
W. S. DARNABY, For Appellant,

CITED—

2 *Bright on Husband and Wife, pp.* 327, 338.
4 *Dana*, 140; *Simpson vs. Simpson.*
Revised Statutes, sec. 7, *chap.* 47.
2 *Bou. Inst.*, 252.
3 *Met.*, 153; *Tevis' ex'rs vs. McCreary.*
3 *Met.*, 504; *Gaines' adm'r vs. Poor.*
3 *Paige*, 483; *Carson vs. Murray.*
4 *Paige*, 516; *Rogers vs. Rogers.*
2 *Edwards' Chy. R.*, 592; *Day vs. West.*
2 *Sandford's Sup. Ct. R.*, 711; *Townsend vs. Townsend.*
30 *Barbour*, 47; *Crepsy vs. McKinney.*
41 *Barbour*, 96; *Wallace vs. Bassett.*
6 *Humphries*, 287; *Parham vs. Parham.*
16 *Ohio*, 531; *Miller vs. Miller.*
31 *English Law and Equity R.*, 35; *Wilson vs. Wilson.*

HUSTON & MULLIGAN and
KINCAID & BUCKNER, For Appellees,

CITED—

5 *Mon.*, 138; *Fauntleroy vs. Crow's heirs.*
16 *Ohio*, 530; *Miller vs. Miller.*
1 *House of Lords Cases, p.* 538; *Wilson vs. Wilson.*
10 *Ohio*, 247; *Thomas vs. Brown.*
Reeves' Domestic Relations, 97, 98, *note* 1.
3 *Paige Chy. R.*, 452; *Gartic vs. Strong.*
7 *Ohio*, 208; *Hardy vs. Van Harlinger.*
19 *Indiana*, 505; *Houghton vs. Houghton.*
7 *Yerger Tenn. R.*, 283; *Watkins vs. Watkins.*
2 *Blackstone, p*, 137; 4 *Kent*, 55.
Roper on Husband and Wife, p. 463.
Revised Statutes, sec. 7, *chap.* 47.
2 *Met.*, 410; *Yancy vs. Smith.*

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CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellant and Richard Loud, deceased, intermarried December 1, 1859, and in the following April she permanently abandoned him and his home, and so continued, when December 6, 1863, they, together with David Bell, as her trustee, entered into articles of separation, which he acknowledged for record January 20, 1864, and she and her trustee acknowledged for the same purpose two days thereafter. Richard Loud died in February, 1866, testate, without devising anything to her, though owning a large personal and real estate.

June 2, 1866, Mrs. Loud, by a written article of release, duly acknowledged and recorded, attempted to relinquish all her interest under the articles of separation, for the purpose of claiming a dower and distributable interest in her deceased husband's estate.

The article of separation recites that she had voluntarily abandoned him "without legal cause to authorize either dower or alimony," and the parol testimony now in the cause justifies this recital. It was then stipulated that he should pay her three hundred dollars, and furnish her the use of a certain brick house and the lot, &c., during her "chosen isolation," pay the taxes, and keep the premises in repair, and secure her free from intrusion or disturbance during her life. This involves two prominent inquiries—

1. Is this a jointure within the meaning of our statute, which the wife may repudiate within one year from her husband's death?

2. Is it obligatory on her without reference to the statute?

It is provided by section 7, chapter 47 (2 *Stant. Rev. Stat.*), that "a conveyance or devise of real or personal state, by way of jointure, may bar the wife's dower;

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but if made before marriage, without her consent, or during infancy, or after marriage, she may, within twelve months after her husband's death, waive the jointure by written relinquishment, acknowledged, &c., and have her dower."

This statute was evidently intended to embrace all jointures made before marriage by the husband without the wife's consent, and all, whether made before or after, and with or without the consent of a minor wife, and also all made subsequent to marriage with a wife living with her husband. The policy of the statute in all these cases harmonizes with the wisdom of our equity jurisprudence, and is confirmed by the observation of the most renowned of the English and American jurists; but it never intended to embrace cases where the parties had separated, and where cause of litigation and divorce existed, especially when the wife was at fault.

The compromise and settlement of causes of litigation between separated husband and wife is as much a subject of favor and solicitude on the part of legal policy as that of other parties; true, the ministers of law should be the more vigilant in scrutinizing such transactions, because of the peculiar relations of the parties, and the superior power and cunning and knowledge of the husband; but when, in good faith, such litigation is compromised through the agency of a trustee selected by herself and advisers, and who faithfully discharges his duties, there is no perceivable motive why the Legislature should virtually forbid this well-guarded and preserving power of the separated wife, which would be the case if she could not bind herself to abide the provisions of such articles, but should still have the right, within a year of the husband's death,

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to renounce and claim as his surviving widow. This would end all compromises between separated husband and wife, and drive them into the courts, however inclined they might be to adjust the matter themselves, and often draw upon the wife a long, vexatious, and to her a ruinous litigation, and which would not unfrequently be as harassing and detrimental to the husband.

Regarding the language, spirit, and presumed motive and policy of the statute, it is not deemed to embrace articles, contracts, and jointures, entered into between separated husband and wife to settle existing causes of litigation, and peaceably accomplish by private contract what could be obtained by a costly and vexatious litigation. Should the husband have a cause for a divorce, why may he not waive this and agree with his wife and her trustee to renounce her legal right to his estate in consideration of an agreed sum? Especially as by suit he could entirely bar her, what public policy or morals would forbid this? Was it intended by that statute to drive the injured husband into the legal forums to vindicate his legal rights as against his erring wife, or might a constructive policy, more in accord with the enlightened jurisprudence of the age, be imputed? As this case is not within the letter nor presumed intent of said statute, we turn to examine the legal powers and rights of the parties independent of it.

In *Carson vs. Murray* (3 *Paige*, 500), Chancellor Walworth, of New York, whilst expressing his doubts as to the public policy of upholding articles of separation between husband and wife, except made under the sanction of a court of justice, yet conceded that it had "long since become the settled law of England that a valid agreement for an immediate separation between husband and

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wife, and for a separate allowance for her support, may be made through the medium of a trustee." He further says, these decisions were anterior to the American Revolution, and, therefore, more potent authority than the subsequent decisions, and he should follow them in preference to the latter.

Nor does the case of *Rogers vs. Rogers* (4 *Paige*, 516), decided by the same learned chancellor, militate against this. In the latter case the wife had brought suit against the husband for separation, alimony, &c.; during its progress she, by the consent of her next friend, compromised the suit, agreed to a separation, he paying her four hundred dollars annually as a support during her life; and it was agreed, verbally, to dismiss the suit; nor did her brother, then acting as her next friend, sign the compromise. The case was then a simple contract between husband and wife, and not obligatory at law, because they were incapable of contracting with each other; beside, there being no written dismissal of the suit, it did not comply with the statute of New York, and was not obligatory; hence, upon her subsequent application in the suit for an allowance to support her and her suit during the litigation, the court properly refused to dismiss the suit because of such agreement, and overruled his objections to an allowance.

Day vs. West (2 *Edwards' Ch'y*, 592) was a suit between vendor and vendee, to recover purchase price, which was resisted because there was an outstanding dower encumbrance, which the vendor insisted did not exist, because the husband—his vendor—and his wife had entered into articles of separation, by which he had agreed to pay her two hundred dollars annually for a support during her life, to be paid quarterly, in consideration of which she surrendered all claim to support from him, and dower in

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his estate; and, subsequently, having filed a bill for a divorce *a mesne et thoro*, a decree was rendered, in which she accepted the gross sum of one thousand one hundred dollars "in lieu of alimony and of *all claims for her separate support and maintenance forever*."

The vice chancellor said the articles of separation could only operate in equity, not at law, to deprive or bar her dower; and in equity, as the husband had violated the articles by not paying the annuity, and had driven her to a suit, he could not set them up, and the decree only allowed a sum in gross in place of alimony and not of dower.

Townsend vs. Townsend (2 *Sandf.*, 713) was an attempt by husband and wife, whilst living together, through the instrumentality of a trustee, to separate their property, without intending to separate, or having cause for separating, themselves; this was so manifestly in contravention of both law and public policy as to meet with the condemnation of the court.

In *Crepsey vs. McKinney* (30 *Bar. N.* Y., 49), the husband and wife, without any trustee on her part, entered into articles of separation. Such has been universally condemned by all courts, so far as we know.

In *Parham vs. Parham et al.* (6 *Hump. Tenn.*, 296), was upon the claims of the surviving wife for dower, which was attempted to be resisted, because of articles of separation, in which, for the consideration paid by the husband, she released all claim for support and maintenance and alimony during her coverture, but which it was alleged and proved, as the court said, was intended to include a relinquishment of dower and distribution, and was left out by the mistake of the draftsman; the court then, without citing a single authority, or referring to a decision, determined that the article of separation was

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void on account of the wife's coverture, notwithstanding she had a trustee; perhaps the reason that no concurring authority was referred to as sustaining that view of the case, none was to be found.

In *Simpson vs. Simpson* (4 *Dana*, 140) this court, in accordance with all previous authority, condemned a mere contract between husband and wife for separation and conveyance of property to her; but it then recognized the validity of articles of separation made through the instrumentality of a trustee for her.

And in *Gains' adm'x vs. Poor* (3 *Met.*, 507), this court held, that a contract by a husband, whilst living in amity with his wife, to pay a given sum as her support in anticipation of future separation, would be against public policy, but not so when made on account of previous separation, or in contemplation of immediate separation.

In *Wallace vs. Bassett* (41 *Barb. N. Y.*, 93), it was held, that the husband who had entered into articles of separation with his wife and her trustee, by which he had conveyed to her the property he got by her and all her future acquisitions and property, was bound thereby, and he could assert no interest in her property after she died, though she left no issue, and although he came technically within the New York statute, giving to the surviving wife or husband one third of the real estate of such deceased wife or husband when there were no minor children.

In *Thomas vs. Brown* (10 *Ohio S. R.*, 247), the Supreme Court of Ohio held, that when a contract of separation had been entered into, by which the husband agreed to convey to the wife a certain portion of his tract of land in fee simple, she to release him from maintenance and from dower, and maintain the three youngest children;

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he assigned her the land; she lived on it and maintained the children, and claimed no dower up to his death, the court regarding it an executed contract upon her part, and partially so on his, only no conveyance had been made, compelled the heirs-at-law to convey in fee simple to her, though there was no writing. And in *Miller's ex'r vs. Miller* (16 *Ohio S. R.*, 531), the same court held the wife bound on a parol post-nuptial agreement of separation, fully executed by the husband. In *Dellinger's Appeal* (35 *Penn.*, 361), the Supreme Court of Pennsylvania held, that articles of separation entered into by husband and wife with her trustee, "did not destroy the relation of husband and wife for all purposes; * * but the articles amount to a total surrender of all rights of property in the husband's estate." If the husband could be bound, but the wife not, under no circumstances, there would be no mutuality, and, therefore, no consideration to uphold it as to him, and to hold him would be to violate an essential principle of all contracts.

Whilst courts should guard with vigilance the rights of wives, it is not meant to disregard those of the husband; and when a wife, without legal cause, shall abandon her husband, and when causes of litigation between them exist, we apprehend that an article of separation entered into with a trustee consenting for the wife, in which the husband provides for her as well, or perhaps better, than the court would compel him, in consideration of which she relinquishes right of dower and distribution in his estate, and the parties continue to act upon this until the husband dies, it is too late for her to complain or seek to repudiate the provision made for her, and demand dower and distribution.

Wherefore, the judgment is affirmed.

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CASE 46—PETITION EQUITY—JANUARY 22.

Stephens vs. Guthrie.

APPEAL FROM LOUISVILLE CHANCERY COURT.

In an action to charge and recover from owners of property within specified distances their proportion of the cost of a cistern in the city of Louisville, which was required to be built by a special ordinance, "*at the exclusive cost of the owners of property chargeable therefor under the city charter and ordinances,*" the petition is demurrable, unless it pleads the general ordinance specifying the distance from the cistern within which the property shall be charged. *In such cases, it is necessary to plead both the special and general ordinance.* (*Babbitt vs. Woolley, &c.*, 3 *Bush*, 703.)

STIRMAN & BEATTIE, For Appellant,

CITED—

Louisville City Charter, edition of 1862, *sec.* 4, *art.* 7.

COKE & ARBEGUST, For Appellee,

CITED—

Louisville City Charter, sec. 4, *art.* 7.

3 *Bush*, 703; *Babbitt vs. Woolley, &c.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The particular ordinance under which the cistern in question was constructed does not specify the distance within which the property shall be charged therefor; yet it expressly provides that it shall be done at the exclusive cost of the owners of property chargeable therefor under the city charter and ordinances.

The demurrer was properly sustained to the original petition, because neither it nor the particular ordinance

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which was made a part thereof contained a statement of the distance within which lots or real estate should be charged with the cost of the cistern. But the amended petition, in which the general ordinance on the subject was pleaded, cured the defect of the original petition, as the distance from the cistern in which property shall be charged is specified in the general ordinance to which reference is made in the particular ordinance which directs this cistern to be built.

In *Babbitt vs. Woolley, &c.* (3 *Bush*, 703), this court held that the general ordinance sufficiently specified the distance as required by the charter, and gave reasonable notice to the lot-owners who should contribute. But in that case it was held that the court below did not abuse a sound judicial discretion in refusing to set aside the judgment dismissing the petition, which did not allege the existence of the general ordinance, because neither the appellant nor the attorney knew until after the petition was dismissed that such an ordinance existed—a fact which it was their duty to have known.

Wherefore, the judgment is reversed, and the cause is remanded, with directions to overrule the demurrer to the amended petition, and for further proceedings consistent herewith.

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CASE 47—PETITION EQUITY—JANUARY 23.

Hydes & Goose, assignees of Norwood & Gill, vs. Joyes.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The general council of the city of Louisville, by ordinance as prescribed in the city charter, may direct or authorize the sidewalks, &c., in said city to be graded and paved, &c., at the cost of the owners of property binding thereon. The council alone can determine the necessity of such improvement, as well as its kind and character. The council has no authority to refer to any other body or person the determination of these things.
2. The power to pass ordinances to improve streets is legislative, and cannot be delegated. It is, in effect, a power of taxation, which is the exercise of sovereign authority.
3. To ordain, generally, that a street or square should be graded and paved, *or "so much thereof as the engineer might direct, and according to specifications to be furnished by him,"* is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things, but rather a general and unlimited letter of attorney to the engineer to have so much of a square or street as he may deem proper improved to his own liking. *To allow such an ordinance to bind the property-holder is to destroy all the safeguards thrown around him by law.*
4. Subsequent acts of affirmance by the city council cannot vitalize or validate a lifeless or invalid ordinance—one conferring no legal authority to make and let the improvements when put under contract.

ROBERT J. ELLIOTT and
CHAS. A. GILL, For Appellants,

CITED—

Acts of Kentucky, 1813, *page* 22, *charter of city of Louisville.*

Act of June 2, 1865, *amending city charter.*

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Session Acts, 1850–51, *vol.* 2, *p.* 624.
Session Acts, 1865, *vol.* 2, *pp.* 506–7.
MSS. Opn., June term, 1863; *Gordon vs. City of Louisville.*
MSS. Opn., February 27, 1864; *L. & P. R. R. Co. vs. Louisville.*

PAT. JOYES, For Appellee,

CITED—

City charter of Louisville and act of June 2, 1865, *above.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Section 4 of the amended charter of Louisville, approved June 2, 1865 (*2d vol. Sess. Acts*, 1865, *p.* 506), repealed section 3, article 7, city charter of 1851, and provides, in place thereof, that "hereafter *said general council may pass ordinances* to procure the grading, paving, curbing, and furnishing with metal gutters, or regrading, repaving, recurbing, and furnishing with metal gutters, the whole or any portion, in width or length, of the side-walks on any square or squares, or portions of a square, within the city limits, *or such one or more of said modes of improvement thereof as the said council may direct or authorize to be done*, and at the cost of the owner of property fronting on such side-walks, and to be apportioned according to the amount actually done in front of such property, or parts of property; and for such costs a lien is hereby created against such property or parts of property: *Provided*, That the general council shall have no power to subject such property-holder to the cost or expense of any repaving or recurbing, unless such work is necessary on account of the worn out or bad condition of the curbing or paving: *Provided*, That when the city changes the grade of any street, alley, sidewalk, or curbing, that has

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been made according to the ordinances of the city, or under the direction of the city engineer, the owner of property fronting such street or alley shall, in nowise, be liable for any costs of such change."

The city council, under authority of this section, as they supposed, enacted the following ordinance: "An ordinance to grade and pave the sidewalks on the west side of Fulton street, Portland, between Market street and Water street, *or such portion of said sidewalks as the city engineer may direct.*

"*Be it ordained by the General Council of the City of Louisville*, That the sidewalks on the west side of Fulton street, between Market street and Water street, *or such portions of said sidewalks as the city engineer may direct, be graded and paved at the costs of the owners of property binding thereon; said work to be done subject to the supervision and control of the city engineer, and in accordance with specifications to be furnished by him*," &c. The mayor and engineer did let out this work, and the undertaker, Norwood, entered into bond, stipulating that he "will grade and pave the sidewalk on the west side of Fulton street, Portland, between Market and Water streets, *or such portions of said sidewalk as may be directed by the city engineer to be graded and paved by ordinance passed by the general council of said city*," &c., dated May 14, 1867. Said ordinance was passed November 1, 1866.

The general council having received the work after being done, apportioned to appellee three hundred and twenty-seven dollars and fifty-four cents of the costs thereof; and he having refused to pay it, appellants brought this suit, setting out said ordinance, the contract and future proceedings of the council, and ask judgment to sell his property; but which the court dismissed upon demurrer, because of the defect in the ordinance, and from which this appeal is prosecuted.

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In the repeal of section 3, article 7, of the city charter of 1851, some of the safeguards around the citizen's rights of property were destroyed. It required a ten days' notification through the public newspapers of the work proposed to be done, and the owner had the right thereon to do it himself; and if so done, the council had no further rights or power over the matter, whilst by the amendment of 1865, no such notification is required, nor has the owner any longer the preference of having the work done; but the first proviso takes away all right from the council to have repaving or recurbing done at the expense of the owner, "*unless such work is necessary on account of the worn out or bad condition of the curbing or paving;*" and the second proviso forbids the council from changing any grade, and having curbing and paving done at the expense of the property-owner, if he shall have previously graded, paved, and curbed under an ordinance of the city; and if it be an original grading and paving, it must be done by ordinance of the council, as declared in the body of the section.

The two branches of the city council alone can determine the necessity of the improvement, as well as its kind and character, and this upon a call of ayes and nays. Nowhere in the original charter or the amendments is there any authority to refer to any other body or person the determination of these things; because, as recently held by the Supreme Court of Missouri, in *Ruggies & Bexter vs. S. A. Collier*, this power to pass ordinances for improving streets, &c., is legislative, and cannot be delegated. It is also in effect a power of taxation, which is the exercise of sovereign authority, and nothing but the most explicit language can justify a court in holding that the Legislature intended to confer such vast power over the citizens' property upon the mere discretion of any single officer,

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much less a simple ministerial one. Nor can, as held in said case, the subsequent acts of affirmance by the council vitalize or validate a lifeless or invalid ordinance—one conferring no legal authority to make and let the improvements when put under contract.

The property-owners are not only interested in the improvements, but also in the kind and character thereof, including the grade and materials and width of pavement, &c.; therefore, they have the legal right to have these things passed on by the city legislature, the members of which are responsible to their constituency for all measures of oppression or neglect.

Pavement signifies to floor with stone, brick, or other hard substance, involving great difference of price as well as durability, and requiring the exercise of sound judgment to determine the economy of the one rather than the other, as the lowest in price might be the dearest to the owner, because of its want of durability. So one grade might be proper and economical, whilst another would be injurious and wasteful.

The determination of all these matters has wisely been confided by the Legislature to the city council and not the engineer. The amount of the improvement, as well as its kind and character, must be ascertained before it is done. We perceive no reason why it is not quite as convenient to ascertain these facts before as after the ordinance; but were it not so, the law and prudence and safety to the property-owner requires that it should be so. It is the exercise of a vast power over the rights and property of the citizen, and whilst necessary to the growth and convenience and commerce of the population of a large city and the public generally, yet such power should be exercised as the law directs, and strictly confined within legal limits.

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To ordain, generally, that a street or square should be graded and paved, or so much thereof as the engineer might direct, and according to specifications to be furnished by him, is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things, but rather a general and unlimited letter of attorney to the engineer to have so much of a square or street as he may deem proper improved, in a manner to his own liking. To allow such an ordinance to bind the property-holder is to destroy all the safeguards thrown around him by law. Suppose, under the plenary power conferred by this ordinance, the engineer had determined that one portion of the square should be of one grade and the remainder of another, and thereby injure the owners of the lots; or had he determined one portion should be paved with brick, another with stone, and a third with plank or some other hard substance, who could say he was transcending his authority? Yet, had such been proposed to the council, it would likely have been unanimously rejected. Extreme as this may seem, yet it elucidates the possible wrong such ordinances may inflict upon the owners, and the great departure it would be from what the law contemplates as an ordinance.

It is as imperative on the council to ascertain what portion of a square needs improvement, when all does not need it, as it is to ascertain when a whole square needs it, and also as imperative to fix the character and quality of the work to be done on a part, as the whole of a square. We do not say that when a portion or all of a square needs improvement, and the council has ascertained these facts, and designated the grade and

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kind of improvement, that, in carrying out the general plan and outline of the improvement so designated, the engineer may not be vested with the power to vary so as to make the work practically subserve the purposes of the general scope of the ordinance as developments may determine; but what we do say is, that the council must determine the portion of the street or square, the grade and kind of pavements, and not authorize the engineer to ascertain and carry out these things without the approval of the council by ordinance.

If the report of the engineer in fixing the grade, designating the portion, and recommending the kind of pavement to the council, should be injurious or oppressive to the property-holder, he would have the right to present his objections to the council before its final determination, and defeat the enactment of the ordinance; and though he may often not be informed even of these, and therefore lose the opportunity to be heard, yet this only the more clearly shows that the council should certainly know what kind of improvements are to be made, as otherwise the property-holder would lose both the right to protect himself in person or by his representative in the council; hence it should be the more clearly informed before he is bound. As said by the city engineer in his able report of 1868, the nearer a strict cash system of compensation for public works can be approached, the more economical it will be; of course the more speedy the recovery, the more summary the remedy, and the fewer the obstructions and hazard to the contractor, the cheaper and more economical it will be to the taxpayer and property-owner.

However specious may be the arguments as to the interest of the individual owners in the enlarged and unauthorized discretion thus conferred upon the engi-

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neer, the great security of the citizen, at least, is always to be found in strictly limiting official power within rigid legal bounds. Power is ever aggressive, and, under one specious pretext and another, perpetually struggling to strengthen its position and enlarge its sphere, and succeeds, to a greater or lesser degree, even when surrounded by the most watchful and jealous vigilance; but when not so surrounded, its strides become fearful and detrimental to the rights and interest of the citizen.

Wherefore, the judgment is affirmed—JUDGE ROBERTSON non-concurring.

CASE 48—PETITIONS EQUITY—JANUARY 25.

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Dear vs. Brannon.

Gregory vs. Brannon, &c.

APPEALS FROM LOUISVILLE CHANCERY COURT.

1. The claimant of an attached horse, coming in as a third and unsued party, obtained possession of the horse by giving bond and security as provided by section 235, Civil Code, that he would perform the judgment of the court, else have the horse forthcoming, subject to the order of the court. Judgment being rendered against the asserted title of the claimant, he is liable on his bond, notwithstanding the death of the horse during the litigation, which was protracted by his wrongful assertion of title to the horse.
2. A third party claimant of attached property, who asserts an unfounded claim and gets possession by executing bond, as provided in the Code, is to be regarded as a bailee in his own wrong, liable for all accidents and hazards.

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3. There is a distinction between bonds rightfully given to retain possession of the property until the litigation is ended and bonds given wrongfully to get a possession the party is not legally entitled to. (*See opinion for a statement and review of cases bearing on these questions.*)

O. F. STIRMAN, For Appellants,

CITED—

Civil Code, sec. 257.
6 *J. J. Mar.*, 529; *Singleton vs. Carroll.*
22 *Pickering*, 381; *Alabama* (*N. S.*) *R.*, 126.
3 *Humphrey's R.*, 473.

THOMPSON & BOOTH, For Gordon,

CITED—

Story's Equity Jurisprudence, sec. 1307.
2 *Dana*, 248; *Keas vs. Yewel.*
5 *Dana*, 551; *Sadler vs. Glover.*
6 *Dana*, 121, 122; *Laughlin vs. Ferguson.*
2 *Mar.*, 320; *Trotter's heirs vs. Hannegan.*
4 *Mon.*, 149; *Holland vs. Bouldin.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The appellants, as creditors of Brannon, sued out their separate attachments, which were levied upon a stallion; and Gordon, claiming said horse as his property, gave bond and security as provided in section 235, Civil Code, that he would perform the judgment of the court, else have the horse forthcoming, subject to the order of the court.

Gordon presented his petition claiming the horse, which claim was referred to a commissioner to ascertain and report the facts. The commissioner found the property subject to the attachments, and the court so adjudged, and ordered a rule against Gordon and his security to produce the horse; to which Gordon responded, that,

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before the judgment, and without his fault, but by the act of God, the horse had died, and therefore he could not produce him.

Upon the trial of this response, the court held it sufficient, and discharged the rule, whether upon evidence does not appear; but we must presume that the court was satisfied of the matters alleged; therefore, we can only adjudge upon this appeal as to the facts as averred.

Whether or not in such a covenant, not stipulating against inevitable casualties, the obligors can be relieved because of the death or other inevitable destruction of the property, has been a much mooted question among jurists, and much difference of opinion exists among courts. There is much reason to reject such an excuse by one presenting an unfounded claim, and thereby protracting the litigation until the casualty happens, which renders the attachment unavailing, unless the creditor is permitted to resort to the bond.

In 2 *Story's Equity Jurisprudence, section* 1307, it is said: "But if the condition be possible at the time when it is made, and afterwards becomes impossible by the act of God, or of the law, or of the obligee, then the bond is saved, and the obligor is not bound to pay it; so, if the condition is in the disjunctive, and gives liberty to do one thing or another, at the election of the obligor, and both are possible at the time, but one part afterwards, by the act of God, or of the obligee, becomes impossible, the obligation is saved;" but in a note to this section it is said there are many exceptions to this general rule, so that it is far from being universally true, and even contra authorities are cited.

As far back as the year 1820, in *Holland vs. Bouldin* (4 *Mon.*, 147), this court held, upon a recognizance of bail, which Bouldin undertook for Fowler, "that he should

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pay and satisfy the condemnation of the court, or surrender the body of the said Fowler to prison in execution thereof;" and the Legislature subsequently, and before judgment, abolished imprisonment for debt, so that Fowler's body could not be surrendered or taken on *ca. sa.;* "that as one of the alternative conditions had become illegal or impossible by act of law, so the whole obligation was discharged"—quoting *Shepherd's Touchstone, chapter* 21, *section* 2, 372, *also* 393; 5 *Coke,* 22, *Loughter's case;* 4 *Coke,* 52, *Rawlings' case.*

In *Keas et al. vs. Yewel* (2 *Dana,* 249), which was substantially an attachment out of chancery to prevent the running off by Keas slaves he had mortgaged to Yewel, whereupon Keas gave bond with security to have the slaves forthcoming to answer the decree which should be made, this court held, that the running away of the slaves without the negligence of the obligors, so that they could not be produced, was a sufficient excuse for nonperformance.

And in *Loughlin vs. Ferguson and others* (6 *Dana,* 121–2), which was an injunction against a forthcoming bond upon various grounds, this court said: "The death of the negro child, which occurred before the appointed day of delivery, was, of course, a sufficient excuse for its non-delivery."

But in none of these cases did a party, setting up a pretended claim to the property, protract the litigation by his unfounded title until it was lost. In this case Gordon protracted the litigation from September, 1866, until the commissioner reported, January 31, 1868, and nothing therein said of the horse's death; judgment on Gordon's litigation, however, was not rendered until April 17, 1868, when, on a subsequent rule, he responded, as an excuse, the horse's decease. Brannon set up

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no defense to the debts sued on, but did controvert the cause of attachment. But for Gordon's claim and the bond he gave, the horse would doubtless have been sold and paid the debts.

The great question is to determine whether this stands on a different footing from the ordinary forthcoming and delivery bonds usually executed by litigant parties to a suit, merely to retain possession whilst the litigation is progressing, and until final judgment, and which does not usually postpone the creditor nor protract the litigation, nor necessarily do so at all.

A defending litigant usually has the legal right to retain possession until judgment and execution; and a bond to have the property forthcoming, to abide the judgment, does his adversary no legal injury. This, however, is not the case when a third party obtrudes as claimant and seeks possession of the property until his claim is adjudicated; for this increases the expense, mutiplies, protracts, and, when the claim is not *bona fide*, vexes the litigation, and is injurious to the plaintiff, and, therefore, does not come within the spirit or reason of the rule.

In section 106 (1 *Story's Equity Jurisprudence*, 102) the general proposition is laid down, that no relief will be granted on account of accident, where the other party stands on an equal equity and is entitled to equal protection.

And in section 108 it is said, the grounds of interference in such cases resolve themselves into the following: That the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner, or that he will be subject to an unjustifiable loss without any blame or misconduct on his own part; or that he has a superior equity to the party from whom he seeks relief.

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And in *Harmony vs. Bingham* (2 *Kernan N. Y. R.*, 115), which was a suit by a freighter against a common carrier for not delivering within the agreed time, one of the excuses being an inevitable casualty by the breaking the Pennsylvania canal, Ruggles, Justice, said the delay in not repairing the canal does not excuse the defendants for not delivering the goods in time. The covenant was to deliver the goods within twenty-six days from the first of April. No provision was made by which they were to be discharged from the obligation upon any contingency whatever. It is a well-settled rule of law, that where a party, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not expressly provide against such contingencies, and exempt himself from responsibility in certain events; and in such an absolute and general contract, inevitable accident will not excuse the performance—citing *Chitty on Contracts*, 734; *Headley vs. Clark*, 8 *T. R.*, 259; *Bebee vs. Johnson*, 19 *Wend.*, 500; 4 *Wheat.*, 216; 6 *T. R.*, 750; *Angell on Carriers*, *sec.* 294.

And in *Wilson vs. Knott* (3 *Hump. Tenn.*, 473) the supreme court of Tennessee held, that when, by contract, a house-builder undertook to complete a house for another, at a specified rate, but after much work, and before completed, the house was destroyed by fire, the owner was responsible to the undertaker for the work done, because the work was his as it was done, and he not having provided against responsibility because of accident, was liable.

These were cases of private contract, uncontrolled by legal rules or legal forms as to the particular covenant entered into, and hence a possible distinction; but still these manifest various exceptions to the general rule laid down, that a subsequent event, making the condition

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impossible, shall excuse the performance. The claimant in this case has been adjudged to be a wrong-doer—in other words, the court has adjudged his claim to be unfounded, and his litigation to be false. Shall he now be heard to say, "True, I have detained this horse wrongfully two years, but now he is dead I can't return him, therefore I ask to be exonerated from my covenant to do so, or to pay the judgment rendered?" The terms of the covenant are unconditionally to return the horse or pay his value, or abide the judgment of the court. Shall the law incorporate other terms for the benefit of the wrong-doer? The rules have not been so far extended either at law or in equity; we see no reason to do so; neither justice nor public policy demands this.

In *Carrol vs. Early* (4 *Bibb*, 270) this court held a defendant in detinue responsible for a slave wrongfully held by him, which died pending the action.

And in *Gentry vs. Burnett* (6 *J. J. Mar.*, 113), upon a bond executed by the plaintiff to get possession of slaves in an action of replevin, one of which died during the litigation, and there being a judgment of return, this court held, that as he was a bailee in his own wrong, and having obtained the possession under a false claim, that he could not set up the death of the slave as an excuse for not returning, however blameless he might have been of the casualty.

The claimant's bond, and proceedings under section 235, Civil Code, bears a striking analogy to the ancient action of replevin—indeed, may be regarded as a substitute for it. But whether so or not, the rights and liabilities of the parties are almost identical.

In *Scott vs. Hughes* (9 *B. Mon.*, 104) the plaintiff in replevin attempted to defeat the judgment of return by alleging the death of one of the slaves subsequent to the

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litigation, without his fault; but this court disallowed the plea, because his possession was wrongful, as was established by finding his claim false, and both his possession and litigation injurious to his adversary; and this was regarded as the destinctive feature between this and the case of *Keas, &c., vs. Yewel* (2 *Dana*, 249).

These cases clearly distinguish between a bond rightfully given, to retain possession until the litigation is ended, and one given wrongfully, to get a possession the party is not legally entitled to. In the latter class of cases the party is to be regarded as a bailee in his own wrong, liable for all accidents, and taking all the hazards; this being very different from a case wherein one of two equally innocent parties must suffer by an inevitable casualty.

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CASE 49—PETITION ORDINARY—JANUARY 28.

Louisville City Railway Company vs. City of Louisville.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. The payment of a tax or license of twenty-five dollars on each car employed by the Louisville City Railway Company to the city, as required by the contract between said company and the city, in which certain franchises are secured to said company, does not exonerate the said company from the payment of an ad valorem tax on its property, horses, stables, &c., which are assessable for municipal purposes.

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2. The exaction of ten per cent. for non-payment of the assessed tax within a prescribed time is not a penalty, for enforcing which an indictment or other judicial process is necessary; but it is only a provisional and valid increase *pro rata* of the assessment, like the assuring provision in a bond for the payment of a debt on a particular day, prescribing the additional payment of ten per cent. in the event of failure to pay on the day. Such a contract has been often adjudged to be legal and enforceable as only rightful augmentation of the debt contracted to be paid.

BARRET & ROBERTS and
R. W. WOOLLEY, For Appellant,

CITED—

New city charter of Louisville, p. 93.
Constitution of Kentucky, sec. 37, art. 11.
Act incorporating appellant, and contract with the city by ordinance.

JOSHUA F. BULLITT, For Appellee.

[No brief in records.]

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

A legislative act of February 15th, 1864, incorporating the "Louisville City Railway Company," authorized it to construct and "operate," with the consent of the city council, street railways, "in such manner and on such terms" as the council, "by contract or otherwise," should prescribe. Accordingly, the city council and the railway company, on the 9th of March, 1864, made a contract containing many stipulations, the ninth of which is in the following words: "The said Louisville City Railway Company shall, for the franchise and privilege herein granted to construct and operate railways over the streets hereinbefore named, pay into the city treasury of the city of Louisville, each and every year, the sum of twenty-five dollars tax or license for each and every car

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run upon their said railways, or such other sum as the general council may fix, not less than twenty-five and not to exceed fifty dollars for each car so used by said company, so long as said company shall operate said railways, or so long as the same shall be operated by any other company."

Under that contract, the company constructed street railways, on which it has been since operating with thirty-five cars moved by horse-power; and, as necessarily subservient to such use, it owns and employs stables, blacksmith-shops, and many horses.

Under an ordinance authorized by legislative enactment for imposing an *ad valorem tax* on property in the city, the horses, stables, and blacksmith-shops used by the company in its running operations were assessed for the years 1866 and 1867, which the company refused to pay. The city, claiming that tax and ten per cent. thereon, as prescribed by the act of Assembly and the ordinance, for all cases of delinquency in payment before a fixed day, the parties submitted an agreed case to the court of common pleas, which adjudged that the company is liable for the tax so assessed, and also for ten per cent. in addition thereto for refusal to pay within the prescribed time.

The company, appealing from that judgment, insists that payment of the conventional twenty-five dollars for each car, which has been punctually made, exonerates it from any other burden in the form of municipal taxation, and also that the ten per cent. is a penalty which cannot be constitutionally enforced by the tax collector, or otherwise than by a judicial proceeding.

On full consideration, this court approves that judgment.

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However beneficial to the local public the facilities of railway travel on the streets may be, still the railroads themselves and the running of the cars over them obstruct the general use of the streets, and subject persons in private conveyances, on horseback, and on foot, to occasional annoyance, inconvenience, and peril; and, therefore, the act incorporating the railway company required the consent of the city, and contemplated a *bonus* for its permission to construct the ways and run cars on them. The price agreed to be paid is only the conventional consideration of *that licensed privilege*, and is, in no sense, a tax on property. The object of the act of incorporation, and the letter and purpose of the contract, allow no other consistent interpretation. Consequently, the payment of the stipulated price of the franchise does not exempt the assessed property of the company, any more than that of citizens generally, from contributions in the form of *ad valorem* taxation for raising revenue for sustaining the municipal government for the protection of the property and the security of all alike.

The price of the license is no more a tax on the company's property than a license to keep a tavern or coffee-house is a tax on the house and its appendages; and no such license exempts such property from taxation.

The right reserved to increase the amount of *bonus* was intended for the probable contingency of an extension of the railways and a correspondent augmentation of the running stock on the streets. The present aggregate of twenty-five dollars a car is about equal to the *ad valorem* assessment as made on other property of the company. Then, if this exempts that property from the tax, the city gets nothing for the license; and if the cars be

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exempt, the city *will pay, instead of being paid, for the privilege granted to the company.* Such absurdities can conclusively fortify the construction we give to the charter of the company and its contract with the city.

The exaction of ten per cent. for non-payment of the assessed *tax* is not a penalty, for enforcing which an indictment or other judicial process is necessary; but it is only a provisional and valid increase *pro tanto* of the assessment, like the assuring provision in a bond for the payment of a debt on a particular day, prescribing the additional payment of ten per cent. in the event of failure to pay on the day. Such a contract has been often adjudged to be legal and enforceable, as only a rightful augmentation of the debt contracted to be paid.

Wherefore, the judgment is affirmed.

CASE 50—PETITION EQUITY—JANUARY 28.

Miller vs. Miller, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1 Testator, a free man of color at the time he made and published his will, previous to the year 1859, had a free wife and three sons, two of them free, one a slave. He devised to his two free sons two lots in Louisville, giving his wife a life estate in one of them, and to her and said two free sons his household and kitchen furniture, and made no disposition of his other personal property. The slave son was emancipated before the death of his father in 1865. *Held*—That, though incapable of taking at the publication of the will, the emancipated son being free at the death of his father, had a descendable and distributable interest in his estate equal to his brothers, and that he should be equalized with them out of the undisposed of personalty

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before they should be allowed any part thereof, as provided by *section* 17, *chapter* 30, *Revised Statutes* (1 *Stanton*, 426).

2. An ademption will not be presumed, but must appear. (*Wickliffe's ex'rs vs. Preston*, 4 *Met.*, 178; *section* 1, *article* 3, *chapter* 46, *Revised Statutes*, 2 *Stanton*, 2.)

3. An ademption does appear, by the testators selling one of the devised lots, collecting, using, and confounding the proceeds with his other personalty, and the entire proceeds, though a small part thereof remained uncollected, should be regarded as part of his distributable personal estate.

J. F. BULLITT, For Appellant,

CITED—

Revised Statutes, *sec.* 25, *chapter* 106.

I. & J. CALDWELL, For Appellees,

CITED—

Revised Statutes, *sec.* 25, *chapter* 106, 2 *Stanton* 464; *and sec.* 17, *chap.* 30, 1 *Stanton*, 426; *sec.* 1, *art.* 3, *chapter* 46, 2 *Stanton*, 2.

4 *Met.*, 178; *Wickliffe's ex'rs vs. Preston.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Charles Miller, a free man of color, previous to the year 1859, made his will, by which he devised to his two free sons two certain lots in Louisville, giving his wife a life estate in one of them, and to her and said two sons his household and kitchen furniture; he made no disposition of his other personal estate. He requested his two free sons, if they should see proper, to buy and emancipate his slave son Henry, then belonging to Isaac Sturgeon, of St. Louis.

In the year 1859 he sold the Broadway lot, devised as aforesaid, at one thousand four hundred dollars, on seven equal annual payments. Before his death he had collected and mixed with his personal estate all but the last payment. Sturgeon had also emancipated Henry before the testator's death, in the fall of 1865, and the testator

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had also purchased the lease of a lot and house thereon after the will was published.

Sturgeon, the executor, filed this petition to have the respective rights of the legatees and heirs settled, and for distribution. The court adjudged the Green street lot to the appellees, encumbered with the widow's life estate, and an equal share of the furniture and the one thousand four hundred dollars, proceeds of the Broadway lot, but adjudged that, as to the lease of the lot and the house and the other personalty, the testator died intestate, and divided these equally between the three sons and the widow, without reference to the devises. Of this Henry complains, insisting that he is entitled to an equal share of all.

By section 17, chapter 30, 1 Stanton's Revised Statutes, 426, it is provided, in case "any real or personal property or money, given or devised by a parent or grand-parent to a descendant, shall be charged to the descendant, or those claiming through him, in the division and distribution of the undevised estate of the parent or grand-parent; and the party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendable and distributable share of the whole estate."

As Henry, though a slave, and incapable of taking at the publication of the will, was emancipated and enfranchised at the testator's death, he had a descendable and distributable interest equal to his brothers; and, therefore, he should have been equalized, out of the undisposed of personal estate, with them, before they should be allowed any part thereof. In other words, the realty and personalty devised to them should be estimated, and then Henry should be allowed as much out of the distributable personalty before they should participate in it.

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But they may claim the one thousand four hundred dollars, proceeds of the lot, under section 1, article 3, chapter 46, 2 Stanton's Revised Statutes, 2, which provides that "the conversion, in whole or part, of money or property, or the proceeds of property devised to one of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise, unless the testator so intended; but the devisee shall have and receive the value of such devise, unless a contrary intention, on the part of the testator, appeared from the will, or by parol or other evidence."

As was held by this court in *Wickliffe's ex'rs vs. Preston* (4 *Met.*, 178), this statute embraces devises of real as well as personal estate, and the ademption will not be presumed, but must appear. In this case, however, it does appear that the testator collected and used and confounded the proceeds with his other personalty, so far as collected, from which an ademption must be presumed; and, therefore, the entire proceeds of the Broadway lot should be regarded as a part of his distributable personal estate; and before either of the appellees or widow should be permitted to participate therein, Henry should be allowed his full distributable share as though his father had died intestate.

As this will likely do ample justice to Henry, it is not essential that we should decide whether he should be regarded as within the saving spirit and intendment of section 25, chapter 106, 2 Stanton's Revised Statutes, 464, because of his civil birth and enfranchisement subsequent to the will, and before his father's death, and, consequently, within the reason and equity of the statute.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

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CASE 51—PETITION ORDINARY—JANUARY 28.

Offutt, &c., vs. Glass.

APPEAL FROM SCOTT CIRCUIT COURT.

The principal paid the obligee interest on notes past due, at the rate of ten per cent. per annum, without the consent or knowledge of his sureties, and without any agreement, upon the part of the obligee, to indulge the obligors for any fixed or definite period, or to indulge them at all. This was not a novation, and the sureties were not thereby released.

ROBINSON & JOHNSON and
M. POLK, For Appellants,

CITED—

1 *B. Mon.*, 325; *Kenningham, &c., vs. Bedford, &c.*
9 *Mad.*, 438; 3 *Ark.*, 91; *Ship vs. Huey.*
2 *Bro. C. C.*, 579; *Nesbitt vs. Smith.*
10 *Bligh. N. S.*, 548; 7 *Hill*, 587.
11 *N. H.*, 335; *N. H. Savings Bank vs. Ela.*
7 *Paige*, 452; *Miller vs. McCan.*
11 *Paige*, 11; *Barry vs. Strong.*
10 *Johnson*, 587; *Rathburn vs. Warren.*
13 *Wend.*, 377; *Huffman vs. Halbert.*
5 *Barbour*, 526; *Hubbell vs. Carpenter.*
2 *Metcalfe (Mass.)*, 176; *Greely vs. Dow.*
4 *Barr.*, 73; *Dundas vs. Stirling.*
5 *N. H.*, 99; *Grafton Bank vs. Woodward.*
10 *N. H.*, 162; *Baily vs. Adams.*
12 *N. H.*, 320; *Merrimac Bank vs. Brown.*
13 *N. H.*, 240; *Fowler vs. Brooks.*
14 *Ohio*, 348; *McComb vs. Kitridge.*
5 *Hill*, 436; *Myers vs. Wells.*

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W. S. DARNABY, For Appellee,

CITED—

1 *B. Mon.*, 322; *Tudor vs. Goodloe.*

1 *B. Mon.*, 325; *Kenningham, &c., vs. Bedford, &c.*

2 *Bush*, 179; *Robinson vs. Miller.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

On the 17th of November, 1861, John M. Glinn executed a note to appellee for one thousand dollars, due six months from date, with Charles Ford and J. J. R. Flournoy as his sureties; and on the 18th of June, 1861, John M. Glinn executed a note to appellee for one thousand one hundred and eighty dollars, with J. J. R. Flournoy and J. Offutt as his sureties, due twelve months after date. In October, 1866, suits were brought on said notes against the principal aud sureties; the suits were heard together, and judgment was rendered against Glinn by default; but the sureties, as a defense, allege, in substance, that they are the mere sureties of Glinn, as appellee well knew, and that he did, without their knowledge or consent, agree verbally with said Glinn to give further time after said notes became due for the payment thereof, and not to coerce payment for the space of ———, for a good and valuable consideration then and there paid by said Glinn, and received by said appellee; that the consideration so paid consisted of fee bills and taxes which appellee owed, and which Glinn, as sheriff of Scott county, had in his hands to collect, and which were surrendered to him, for which he agreed to indulge him for the space of ——— next.

The deposition of Glinn was taken by appellants, who proves that, in a conversation with appellee on the subject of these notes, he told him he wanted ten per cent.

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on his money, and if he, the witness, would secure him four per cent., the notes could run on at six per cent., but if not, he must hunt up his sureties and renew the notes, they then being past due. That he replied to appellee he might take the four per cent., to make him up his ten per cent. on his money, out of the taxes he then owed the witness as sheriff, and fee bills he had against him. This occurred in the fall of 1862. There was nothing done during that year; but in the spring or summer of 1863 he handed the tax receipts for appellee's taxes, and the fee bills, to Mr. Ireland, and told him he had made an arrangement with appellee to deliver them to him, and directed Ireland to hand them to appellee, which was done, as he told him; and that he also told him, after he had received them, that he had made the calculation of the four per cent. on said notes, and it did not require the full amount of fee bills and taxes to pay the same; that he owed him a balance, for which he would give him a credit, if he paid the notes or upon their renewal; that he also told him it was satisfactory. And in a subsequent part of his deposition, in answer to a question asked him, he said it was clearly his understanding, that if he would secure plaintiff four per cent., he would not bring the suit. And he further proves, that the interest was calculated up to the time he had gone to town in the summer of 1863, which was necessarily the interest due up to that time.

Ireland proves that he delivered the tax receipts and fee bills to Glass on the 22d of May, 1863, which were to be credited on the *notes* he held on Glinn, under an arrangement he had with him.

But neither Glinn nor Ireland prove that there was any agreement with Glass that he would indulge the obligors in said note for any fixed or definite period, or, indeed,

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that he would indulge them at all; but the payments were for the accrued usurious interest on the notes, and the overplus he was willing to pay to Glinn, or to credit on the notes, which repels the conclusion that there was any binding contract for indulgence at all.

The evidence fails to establish any valid contract or agreement for forbearance, or any contract whatever for future indulgence, and there was no novation whereby the sureties could be released. But the evidence does establish the fact, that the tax receipts and fee bills were received to be credited upon the *notes* then held by Glass on Glinn as *principal*, and Flournoy and Ford and Flournoy and Offutt as sureties, under an agreement previously made by the parties; and having agreed upon what debts they were to be credited, appellee had no right to apply them as credits on any other debt of Glinn. Glinn had a right to direct, at the time of the payment, upon what debts they should be credited, and having done so, appellee had no right to change or disregard the direction.

Wherefore, the judgment is reversed, and the cause is remanded, with directions that the court below credit the judgment with the sum of two hundred and eighty-eight dollars as of the first of September, 1862, to be apportioned between the note of Glinn, with Flournoy and Ford as his sureties to appellee, and that of Glinn, with Flournoy and Offutt as his sureties, according to their respective amounts.

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CASE 52—MANDAMUS—JANUARY 29.

Haly vs. Auditor.

APPEAL FROM FRANKLIN CIRCUIT COURT.

On motion for mandamus against the Auditor to compel him to draw his warrant upon the Treasury to pay plaintiff a balance claimed for materials furnished and work done on public buildings under a contract with the State Librarian, it does not appear from the petition whether the work was done under a contract made by the directions and advice of the Governor or not; and as the petition alleges that the plaintiff was employed by the Superintendent to do the work, and does not disclose that the contract was not in writing, it must be presumed that the officers did their duty in the absence of facts to sustain a contrary conclusion. Such facts not being apparent on its face, the circuit court erred by sustaining a demurrer to the petition. (*See Rev. Stat., sec.* 1, *art.* 2, *chap.* 78, *and art.* 1, *chap.* 16.)

D. W. LINDSEY and
ALFRED HENSLEY, For Appellant,

CITED—

Revised Statutes, 1 *Stanton*, 240, 242; 2 *Stanton*, 221.

JOHN RODMAN, Attorney General, For Appellee,

CITED—

Revised Statutes, vols. 2, 220, 221, *sec.* 1.
Constitution of Kentucky, sec. 5, *art.* 8.
15 *B. Mon.*, 444; 4 *Met.*, 373.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The appellant, John Haly, filed his petition in the Franklin circuit court praying that the writ of *mandamus* be awarded against the Auditor, to compel him to issue

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his warrant upon the Treasurer in favor of the plaintiff for three hundred and twenty dollars, the alleged balance due the plaintiff from the State of Kentucky for work done and materials furnished in repairing and improving certain public property on the public square, in Frankfort, under a contract with G. A. Robertson, State Librarian, and superintendent of the public property at the seat of Government.

With his petition the plaintiff exhibited a statement of work done and materials furnished under said employment, amounting to one thousand and fifty-nine dollars and ten cents, certified to be correct by said superintendent, and approved by the Governor, and indorsed with the following memorandum, signed by the Auditor:

"Pay seven hundred and thirty-nine dollars and ten cents on this account—the balance rejected; the revenue department not chargeable therewith, but the military department."

The defendant having been summoned to answer the petition, appeared and entered a general demurrer thereto, which, being heard, was sustained, and the plaintiff failing to plead further, the court rendered a judgment dismissing the petition; and from that judgment the plaintiff prosecutes this appeal.

It is insisted for the Auditor that the demurrer was properly sustained, because it was not alleged in the petition that the repairs and improvements were made by the plaintiff in compliance with a written contract first made by the superintendent of public property, and approved by the Governor; and in support of this position, we are referred to a provision in the first section of article 2, of chapter 78, of the Revised Statutes, relating to certain expenditutes, to be approved by the Governor, which declares that "no expenditure shall be approved

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by the Governor, or money paid from the Treasury for the same, unless it was in compliance with a contract in writing, first made by the superintendent, and approved by the Governor."

And it is further contended for the appellee, that, as the petition sought to compel the Auditor to issue his warrant in favor of the plaintiff, instead of the superintendent, the demurrer was rightly sustained according to another provision of said section, directing that the Auditor's warrant for expenditures shall be issued in favor of the *superintendent*.

On the other side, it is insisted that the case is embraced by the more comprehensive provisions of the first article of chapter 16 of the Revised Statutes, the first section of which declares "that claims and demands upon the Treasury, specified in this chapter, shall be paid when due, by the Treasurer, to the persons entitled to the same, the warrant to be issued by the Auditor of Public Accounts, upon such proof, by vouchers of the service rendered, or of the justice of the demand, as herein required." And the third subdivision of section 9 of said article designates for payment, as aforesaid, "the costs of all repairs made, from time to time, by the keeper of the State House, by the directions and advice of the Governor, and upon the public buildings and inclosures on the State House square, at the Seat of Government. The amount due for any of the objects aforesaid to be certified and approved by the Governor, accompanied by the vouchers."

To render these provisions of chapter 16 consistent with those of chapter 78, so far as they both relate to claims for repairs on the public property, those of the last named chapter must be restricted in their application to contracts made by the superintendent, unaided

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by the "*directions and advice*" of the Governor, or, in other words, without his participation in making the contracts, although to be approved by him when made.

It does not appear from the petition in this case, whether the work was done under a contract made with the directions and advice of the Governor or not; and as the petition alleges that the plaintiff was employed by the superintendent to do the work, and does not disclose that the contract was not in writing, it must be presumed that the officers did their duty in the absence of facts to sustain a contrary conclusion. Such facts not being apparent on the face of the petition, and its statements being, in our opinion, sufficient to authorize the relief sought by the plaintiff, it seems to us the court erred in sustaining the demurrer of the defendant and dismissing the petition.

Wherefore, the judgment is reversed, and the cause remanded, for further proceedings not inconsistent with this opinion.

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CASE 53—PETITION EQUITY—JANUARY 29.

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Howard vs. Howard's ex'r, &c.

APPEAL FROM MARION CIRCUIT COURT.

1. "I will that my daughter, Laura Mattingly, and her children, have my home farm at twenty-five dollars per acre; they to pay my other heirs the amount necessary to make them equal, share and share, in my estate, after deducting the amount each heir has already received, for which I hold their notes."

"I will to my beloved wife, Charity Howard, one third of my whole estate of which I die possessed."

In construing the foregoing conflicting clauses, *the court held*, that the widow was entitled to one third of the real estate of her deceased husband in fee; and that Mrs. Mattingly and her children are entitled to the two thirds of the "*home farm*," for which they must pay twenty-five dollars per acre. (*See sec.* 7, *chap.* 80, *Revised Statutes*, 2 *Stanton*, 227.)

2. When two clauses of a will or two devises in a will are repugnant, and cannot stand together, the clause or devise which is posterior in local position must prevail; the subsequent words being regarded as denoting a change of intention of the testator from that previously expressed. (*Jarman on Wills*, 394, *top page; Hunt vs. Johnson, &c.*, 10 *B. Mon.*, 342.)

ROUNTREE & FOGLE, For Appellant,

CITED—

1 *Jarman on Wills, top pp.* 394–5–6–7–8.
2 *Roper on Legacies, top pp.* 1459, 1460, 1472.
Revised Statutes, sec. 7, *chap.* 80, 2 *Stanton*, 227.
4 *Kent's Com., p.* 537.
3 *Mon.*, 279; *Adie, &c., vs. Cornwell.*
10 *B. Mon.*, 344; *Hunt vs. Johnson, &c.*
17 *B. Mon.*, 740; *Morse, &c., vs. Cross.*
3 *Met.*, 159; *Augustus, &c., vs. Seabolt.*

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W. J. LISLE, For Appellees,

CITED—

10 *B. Mon.*, 344; *Hunt vs. Johnson, &c.*
3 *J. J. Mar.*, 321; *Berry vs. Headington.*
Revised Statutes, 2 *Stanton*, 227.
4 *Kent's Com.*, *side page* 535.
12 *B. Mon.*, 656; *Moore vs. Moore.*
3 *Met.*, 159; *Augustus, &c., vs. Seabolt.*
2 *Marshall*, 466; *Harper, &c., vs. Wilson, &c.*
10 *Wheaton*, 205; *Wright vs. Denn.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This litigation results from two apparently irreconcilable or conflicting clauses of the will of John Howard, deceased, which read as follows:

1st. "I will that my daughter, Laura Mattingly, and her children, have my home farm at twenty-five dollars per acre; they to pay my other heirs the amount necessary to *make* them equal, share and share, in my estate, after deducting the amount each heir has already received, for which I hold their notes."

2d. "I will to my beloved wife, Charity Howard, one third of my whole estate of which I die possessed."

The court below adjudged that the widow, Mrs. Charity Howard, after the payment of the debts of testator, and of the specific legacies to Hutchins and the Monks, was entitled to the one third of the personal estate absolutely, and to the one third in value of the real estate for life of which the testator died possessed; that Laura Mattingly and her children are entitled to the home farm, including the one third thereof adjudged to the widow for life, &c. The residue of the judgment need not be recited, as the widow alone complains of it, and the part recited is all that affects her interest.

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Mrs. Howard, the appellant, insists that she is entitled, under the will of her husband, to one third of his real estate in fee.

There is certainly ambiguity in the second and last clauses of the will of John Howard, herein quoted, and they are in conflict; for Mrs. Mattingly and her children cannot have the whole of the home farm of the testator and his widow the one third of his estate.

As a solution of the difficulty, the circuit judge construes the devise to the widow as giving to her only a life estate in one third of the land.

If the English rule of construing such devises had not been changed by legislative enactment, the construction of the circuit judge would have been proper for a devise of real estate to A, without adding words of inheritance, such as to A "*forever*," or to A and his heirs; the devise was construed as intending to pass to the devisee an estate for life only. But that rule of construction is changed by a statute of this State, which provides that every estate in land, created by deed or will, without words of inheritance, shall be deemed a fee simple, or such estate as the grantor or testator had power to dispose of, if a less estate be not limited by express words, or by necessary inference. (*Sec.* 7, *chap.* 80, 2*d vol. Rev. Stat.*, *p.* 227.)

The power of the testator to pass a fee simple estate in the land is not questioned. There are no express words of limitation of the devise to the widow, and, consequently, she must take a fee simple estate in the one third of the lands of the testator, unless there be something in the will from which it must be necessarily inferred that he intended that she should take a less estate.

The only thing relied upon is the devise in the second clause of the home farm to Mrs. Mattingly and her chil-

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dren at the price of twenty-five dollars per acre. If full effect is given to that clause, according to the strict import of the words, the widow could get no part of that tract of land; for the language is very broad, comprehending the whole estate therein, by paying the price fixed on it by the testator, that price being the same for every acre. No inference can be drawn from that part of the will that the testator intended to limit his wife to a life estate in one third of the land.

The established rules of construction, where different clauses of a will are conflicting, must be resorted to, to solve the difficulty, viz: Where two clauses of a will or two devises in a will are repugnant, and cannot stand together, the clause or devise which is posterior in local position must prevail, the subsequent words being regarded as denoting a change of intention of the testator from that previously expressed. (*Jarman on Wills*, 394, *top page; Hunt vs. Johnson, &c.*, 10 *B. Mon.*, 342.)

This well established rule of construction furnishes the safest guide to a satisfactory conclusion of the testator's intention, otherwise irreconcilable.

Wherefore, the judgment is reversed, and the cause is remanded, with direction to render judgment for appellant for one third of the real estate of said John Howard, deceased, in fee; and that Mrs. Mattingly and her children have the two thirds of the "*home farm*" of said testator, for which they must pay twenty-five dollars per acre, and for further proceedings not inconsistent herewith.

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CASE 54—PETITION EQUITY—JANUARY 30.

Crutchfield vs. Thurman.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The purchaser of a house and lot in Louisville at a decretal sale, in proceedings by attachment against an absent defendant, told one witness at the sale that he intended to buy the property for the benefit of the owner, and if he should buy, would hold it for his use. The proof showed that the property sold for its value at the time of sale, and failed to show that the witness would have bid more than it was actually sold for. The petition for the recovery of the property, failing to allege a tender, or to make an offer of reimbursement, was dismissed by the chancellor, and that judgment is affirmed.
2. If the appellant was wronged in the sale of his property by the purchaser, and might, if true to the Union have a just claim to be righted by this court, his hostile attitude, in having been engaged in the Confederate service, would not affect his right to enforce an implied trust, not from contract, but from fraud. But the solitary testimony of *one witness*, however credible, is not of such a definite and unquestionable character as to establish, in this case, the alleged fraud and resulting trust, against the positive denials of the answer.

BUNCH & LEE,
I. & J. CALDWELL, and
CRADDOCK & TRABUE, For Appellant,

CITED—

7 *Mon.*, 617; *Blight's heirs vs. Tobin.*
Hill on Trustees, 144–5.
3 *Bibb*, 177; *Estill vs. Estill, &c.*
1 *Mar.*, 231; *Owings vs. McClain.*
3 *J. J. Mar.*, 276; *Orr vs. Pickett, &c.*
3 *Johnson's Chy. R.*, 261; *Duke of Cumberland vs. Cadrington, &c.*

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4 *Johnson's Chy. R.*, 136; *Shepherd vs. Eaves.*
1 *Johnson's Chy. R.*, 339; *Haven vs. Hays.*

O. F. STIRMAN, For Appellee,

CITED—

Hobart's R., 105; *Lampleigh vs. Brathwait.*
Smith's Leading Cases, 4th Amer. ed., s. p. 67, *top page* 193.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The appellant, Edward Crutchfield, domiciled in the city of Louisville, Kentucky, in a brick tenement owned by him on First street, between Chestnut and Gray streets, left Kentucky in September, 1861, engaged in the cause of the Southern Confederacy, and did not return home until some time in the year 1865. During his absence some of his creditors, proceeding by attachment, obtained, in the city court of chancery, a decretal order for the sale of the house and lot, which, in execution of that judicial mandate, the marshal sold at auction to the appellee, B. S. Thurman, as the highest bidder, at a fraction under seven thousand dollars, and afterwards conveyed to him the legal title. Shortly afterwards the appellee took possession, which he has ever since retained by his own actual occupancy; and being partially dilapidated, he expended about two thousand two hundred dollars in repairs and other improvements.

On the 29th of October, 1866, the appellant filed a petition in equity in the same court for reinstating his right and possession, on the charge that the appellee, fraudulently intending to purchase the property for less than its value, artfully proclaimed to the by-standers at the sale that he was bidding for the benefit of the appellant, and would, if he should buy, hold the property for his ultimate use, and, on his return, would

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restore it to him on being reimbursed the cost of his purchase, whereby he prevented competition and bought the property too low.

The appellee's answer positively and explicitly denied these allegations; and the only testimony in support of them is that of William K. Thomas, who testified that, as a friend of the appellant, he attended the sale for the purpose of buying the property for the appellant's benefit, and to that end intended to bid for it, but did not bid because the appellee, on being informed of his object, told him that he was bidding for the same purpose, and would, if he should buy, hold on the same condition to the appellant's use.

The petition neither alleged a tender nor made an offer of reimbursement; and the chancellor, on the hearing, dismissed the petition.

Although there is some contrariety in the evidence as to the vendible value of the property when sold, yet there is a decided preponderance, in number and in intrinsic force, in favor of the conclusion that, considering the condition of the property, the stagnation and depression resulting from the pendency of the civil war, and the encumbrance of the contingent right of the appellant's wife to potential dower, and which has become consummate by his death during the pendency of this appeal, the sale was for a fair and full price.

On these facts we find it difficult to reverse the chancellor's decree.

If the appellant was wronged, and might, if true to the Union, have a just claim to be righted by this court, his hostile attitude would not affect his right to enforce an *implied* trust resulting, not from contract, but from fraud.

But the solitary testimony of one witness, however credible, is not of such a definite and unquestionable

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character as to establish the alleged fraud and resulting trust against the positive denial of the answer. From that isolated and rather indeterminate evidence we cannot, with judicial confidence, infer that Thomas, without any communication by the appellee, would have bought the property for the appellant, or would have bid for it more than the appellee bid; and certainly there is no satisfactory proof that any essential damage has resulted to the appellant from the sale as made, or from the appellee's persistent retention of the property as his own, without regard to his alleged assurances to Thomas, which, being made confidentially to him alone, could not be presumed to affect the attendant crowd, none of whom would overbid the appellee, because, as we must infer, no one was willing to give more than he offered.

On such pleadings and evidence concerning a trust so indefinite and questionable, it seems to us, on full and careful reconsideration, that we ought not, in the exercise of a sound and provident discretion as a court of the last resort, to reverse the decree of an enlightened chancellor; and this conclusion is fortified by the important consideration that a complaining party, invoking such an equity, has failed to offer to do equity by reimbursing the other party, and which perhaps might require the experiment of another sale; and by the fact also that, after all that the appellee has expended in the purchase and on the improvements, the appellant's widow may be now entitled to dower.

Wherefore, the judgment is affirmed.

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CASE 55—PETITION EQUITY—FEBRUARY 2.

Elliott, &c., vs. Nichols, &c.

APPEAL FROM NELSON CIRCUIT COURT.

1. TENANTS BY THE ENTIRETY.—A conveyance of land to husband and wife and their heirs, before the Revised Statutes took effect, as at common law, constituted an estate by entireties, which neither husband nor wife could sever, or make liable for debts as against the other. Death terminates the title, in such estates, of the first one dying, and the survivor acquires no new or additional title from the decedent, but holds the entire estate under and by virtue of the original conveyance.
2. In conveyances of land to husband and wife, made since the Revised Statutes took effect, as therein provided, "*unless a right by survivorship is expressly provided for, there shall be no right to the entirety by survivorship between them*, but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such a tenancy." (*Sec.* 14, *art.* 4, *chap.* 47, *Revised Statutes*, 2 *Stanton*, 27.) This change in the rule of the common law is not retrospective, and does not apply to conveyances made before the Revised Statutes took effect.
3. As the entire title and estate was vested in both the husband and the wife *as the tenants by entireties*, the legislature could not have averted any portion of the title.

E. E. McKAY and
J. W. MUIR, For Appellants,

CITED—

Revised Statutes, *sec.* 14, *chap.* 42, 2 *M. & B.*, 876.
1 *Dana*, 37; *Ross vs. Garrison.*
1 *Dana*, 242; *Rogers vs. Grider.*
3 *Bibb*, 3; *Gist's heirs vs. Robinet.*
1 *Duvall*, 272; *Babbitt vs. Scroggin.*
3 *Bush*, 454; *Croan, &c., vs. Joyce, &c.*

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Elliott, &c., vs. Nichols, &c.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

January 23, 1837, Henry Nichols conveyed to his daughter Elizabeth, and her husband, Henry Nichols, certain lands, to them and their heirs forever, which, together with other lands, the husband mortgaged March 9, 1865, to appellants, to secure various specified debts.

Mrs. Elizabeth Nichols died in the year 1861, leaving appellees as her children and heirs at law, who resist the foreclosure of the mortgage on one half the land so conveyed by their grandfather to their father and mother, claiming that, by the Revised Statutes, enacted in the year of 1850, the right of survivorship was abolished in such estates, and that they held as tenants in common, and, therefore, by moities, with a mutual right of curtesy and dower of the survivor in the half of the other; hence they insist that the creditors could only foreclose as to the life interest of their father, as tenant by the curtesy in their mother's half of said land.

Section 14, article 4, chapter 47, 2 Stanton's Revised Statutes, 27, provides, that "where any real estate or slave is conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them; but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such a tenancy."

By section 14, chapter 21, 1 Stanton's Revised Statutes, 262, it is declared that "no part of this revision is retrospective, unless expressly so declared;" and, although the language and construction of the enactment relative to such estates might be construed to apply to existing titles, and abolish the right of survivorship between husband and wife, and change the estate from an entirety into one in common, yet, as the language is not neces-

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sarily expressive of such an intention, we would not hasten to give it a retrospective application, especially in view of a want of constitutional authority in the Legislature to so enact. Husband and wife, for most purposes, having but one united legal existence, conveyances to them by the common law, which remained in force in this State until our revision of 1850, created a peculiar estate, in which both held the entire title; consequently, the death of either conferred no new estate or title on the other, but only destroyed the possibility of decedent's survivorship, in which case that one would have remained the sole owner.

By the common law, joint tenants could destroy the right of survivorship by the sale of their respective portions, or by compelling, which they could do, partition; whilst this peculiar tenancy of husband and wife could not be destroyed by the sale of either, nor could partition be compelled by any means known to the law.

This possibility of survivorship, and contingent possibility that the unity between joint tenants would not by any means be destroyed, and right of the survivorship remain, was not such a present vested interest as created or constituted an estate, either leviable by execution, subject to decretal sale, or even vendible and assignable by the tenant himself, but was a mere legal incident to such estates, as a rule of law, which the Legislature might abolish.

So in *Edwards vs. Barick* (5 *Denio*, 668), the court of errors of New York, in able, exhaustive opinions by Judge Beardsley and others, held, that when a father had devised two separate tracts of land severally to his sons, Joseph and Medcef, and their heirs and assigns, but should either die without lawful issue, his tract to go to the survivor, and left the two sons executors, with others,

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and they, as executors, mortgaged Joseph's tract, and Joseph having afterwards died without issue, and, subsequently, Medcef died leaving issue, who brought ejectment against the mortgagee in possession, it was held that, by the father's will, Joseph took a determinable, qualified, or bare fee in the land primarily devised to him, which was certainly effective as an estate for life; but that no present estate or interest therein passed to Medcef during Joseph's life, his interest being what the law terms a mere possibility of future interest, which, being neither an estate, interest, nor right *in esse*, was incapable of being transferred by grant or assignment at law.

In equity, however, when a party, for a valuable consideration, has sold such a possible interest, he will be deemed the trustee of his vendee, and when he gets the title, as holding it for him, and compelled to release it to the vendee.

But, as said by the Court of Appeals of Virginia, in *Thornton vs. Thornton* (3 *Randolph*, 183), all the books agree, *una voce*, that husband and wife not only cannot compel each other to make partition, but even if they concur in the wish, they have not the power to sever the tenancy. It is a *sole*, and not a *joint* tenancy. They have no *moieties*. Each holds the *entirety*. They are one in law, and their *estate one and indivisible*. If the husband alien; if he suffer a recovery; if he be attainted, none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession—something which he had not before—*the right of the deceased*. But, as between husband and wife, the survivor *takes nothing from the decedent;* acquires no

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new title nor interest nor estate thereby; but takes by the original conveyance the whole, because invested thereby with the entire estate. The survivor gets the entire estate by virtue of the title being in him or her by the original conveyance, but rid of the possible contingency of the other's surviving and retaining the estate, because likewise so invested in that party.

It is plain, therefore, that the husband had the entire title to this land by the original conveyance, in the year 1837. So had his wife; and had she survived him, she would have retained it; and neither the husband, nor his heirs or assigns, nor the mortgagees, nor even the purchasers under a decretal sale foreclosing the mortgage, could have held against her. Nor can her heirs claim or hold any portion of the land as against the surviving husband or his assigns; but the whole tract should have been ordered to be sold in payment of the mortgage debts, or a sufficiency for said purpose.

As the entire title and estate was vested in both the husband and wife, the Legislature could not have diverted any portion of the title, and we must presume did not intend to do so, but that, as a rule of property and a declaration of the legal effect of such deed subsequently made, and the legal rights of the parties thereunder, said statute was enacted.

The numerous cases recognizing the common law rules as to such conveyances by this court need not be referred to, all harmonizing, as they do, with this opinion.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

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CASE 56—PETITION ORDINARY—FEBRUARY 2.

Louisville and Nashville Railroad Company vs. Robinson.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. The implied undertaking between a Railroad Company and its employees in the same class of service, does not exonerate the company from liability for damages, resulting to one of such co-agents, from extraordinary, or gross negligence of another of such agents, in the same line of service. The principles of the case of *Louisville and Nashville Railroad Company vs. Collins* (2 *Duvall*, 114), are adhered to without qualification.
2. Engineers and brakesmen are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakesman on a freight train, does not affect the reason and policy of implying, as between themselves, such associations, knowledge, and trust, as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert.
3. Gross neglect is either an intentional, or such a reckless disregard of security and right, as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which, in some respects, is *quasi criminal.*
4. If the employe, or agent complaining of hurt, contributed to it, by his own negligence, he cannot recover damages from the Railroad Company, unless its co-operating agent, charged with gross neglect, could have avoided the impending damage, by the observance of ordinary diligence, notwithstanding the neglect of the complaining party.

I. & J. CALDWELL, For Appellant,

CITED—

2 *Duvall*, 118; *Louisville and Nashville R. R. Co. vs. Collins.*

Law Register, March No., 1866, *Redfield's notes.*

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J. G. WILSON, For Appellee,

CITED—

4 *Met.*, 49; 1 *McMullen*, 385.

2 *Duvall*, 118; *Louisville and Nashville R. R. Co. vs. Collins.*

3 *Mus. & Welsb.*, 1; *Priestly vs. Fowler.*

1 *Bush*, 402; *Louisville and Nashville R. R. Co. vs. Young.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted for reversing a judgment in the appellee's favor against the appellant for five thousand dollars, on a verdict for that amount in an action for the loss of a leg by being run over by a locomotive engine and tender, in the yard of the depot at Bowling Green, Kentucky. There were three tracks in the yard, with switches for regulating the movements of trains and engines coming in and going out. The engine and tender which ran on the appellee belonged to the passenger train, and the appellee was brakesman on a freight train of the company. Being in the yard, the appellee started on the central track to go out to the caboose of his freight train, and, while walking on that track, the engine and tender, on a signal given by the hand of the switchman, made a retrograde movement toward the appellee's back and ran on him. That movement was sooner than usual or necessary, and without any audible signal; but the steam was up when the appellee started on the track. It does not appear that either the engineer or switchman, when the movement was made, saw the appellee on the track, or had any reason to apprehend that he would continue on it.

This case must be ruled by that of *Louisville and Nashville Railroad Company vs. Collins* (2 *Duvall*, 114), to the principles of which this court adheres without qualifica-

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tion. But, in one respect, the two cases essentially differ. Collins and the engineer, though employes of the same company, were, nevertheless, not in any way associated in the same kind of service; but the appellee and the engineer, in this case, were employed in the same running operations; and the fact that one served on a passenger and the other on a freight train, does not affect the reason and policy of implying, as between themselves, such associations, knoweldge, and trust, as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert. But this implied understanding between the company and its employes in the same class of service does not, as adjudged in the case of Collins, exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another of them. Gross neglect is either an intentional wrong, or such a reckless disregard of security and right, as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law which, in some respects, is *quasi criminal*. But if the party complaining of hurt, by his own negligence contributed to it, he cannot recover damages from the company unless its co-operating agent, charged with gross neglect, could have avoided the impending damage by the observance of ordinary diligence, notwithstanding the neglect of the complaining party.

These are the principles recognized in Collins' case; and the court below, in giving and overruling instructions, tried to conform to them. But they were not so defined as to enable the jury to apply the law to the facts with reasonable certainty; and, tested by the true standard applied to all the facts, the second instruction

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given in appellee's favor was evidently erroneous in omitting all consideration of the question whether he was not guilty of contributory negligence in walking and continuing on the central track when he did; and whether, *after the locomotive car moved*, ordinary vigilance and care by the engineer could have prevented the collision.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

CASE 57—PETITION ORDINARY—FEBRUARY 2.

Woodward vs. Birch, &c.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. Innkeepers are liable for money surrendered to their custody by a guest, unless they took extraordinary care of it.
2. Innkeepers are responsible for the good conduct of their employes. (*Weisenger vs. Taylor, &c.*, 1 *Bush*, 276.)
3. A clerk in the employment of an innkeeper, being intrusted with the key of his safe, procured another key to be made. The innkeeper had knowledge of the existence of the false key, discharged his said clerk, but made no change in the lock of his safe. The clerk, some time after he was discharged from service, by means of the false key entered the safe and took therefrom money which had been deposited therein by a guest of the house. The innkeeper is responsible, notwithstanding he may have told the guest, at the time he surrendered the money to him, that his safe had recently been robbed, and that he would not be responsible for money deposited in it.

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BARNET & EDWARDS and
BARRET & ROBERTS, For Appellant,

CITED—

2 *Duvall*, 562; *Nock vs. Adams Express Co.*
1 *Bush*, 276; *Weisenger vs. Taylor.*

O. F. STIRMAN, For Birch,
MUIR & BIJUR, For Ormsby,

CITED—

1 *Phillips's on Ev., 4th Amer. ed., p.* 633.
Story on Bailments, sec. 479.
8 *Co. R.*, 32, *Coyle's case.*
5 *Q. B.*, 164; *Dawson vs. Channing.*
25 *Wendell*, 642; *Hawley vs. Smith.*
1 *Yates*, 34; *Snider vs. Geiss.*
9 *Pickering*, 280; *Mason vs. Thompson.*
21 *N. Y.*, 111; *Purvis vs. Coleman & Stitson.*
31 *Maine R.*, 478; *Shaw vs. Berry.*
33 *N. H.*, 553; *Libby vs. Aldrich.*
36 *Barbour's S. C. R.*, 75; *Gile vs. Libby.*
2 *Parsons on Contracts, 5th ed., pp.* 147, 155.
17 *Q. B.*, 261; *Armstead vs. Wilder.*
8 *N. H.*, 408; 8 *B. & C.*, 9.
21 *Wend.*, 282; 3 *Hill's N. Y.*, 485.
9 *Hump.*, 746; 1 *Cal.*, 221.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted to reverse a judgment in favor of appellees, in an action brought by appellant against them, for the recovery of one thousand eight hundred and eighty dollars and fifty cents, stolen from their safe, while he was their guest in their public inn, called the Shelby House, in the city of Louisville, which loss appellant charges resulted from their culpable negligence.

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The defense mainly relied upon is, that when appellant proposed to deposit his package in the safe of appellees, he was informed by one of them and their clerk that valuable packages would not be secure in their safe, that it had been robbed a few weeks before, and they would not be responsible for any package or thing of value put in said safe; and if appellant's package was put in their safe, it would be *there* at his own risk.

From the evidence of Spencer, who was clerk in the house, it appears that in November, 1867, appellant stopped at the Shelby House, in Louisville, kept by appellees; that he offered to the witness a package, which he said contained money, and asked him to put it in the safe; that he told appellant that Mr. Birch had the key of the safe, and had gone to bed, and also told him he had as well take his money to his room with him; it would be as secure there as in the safe, for it had been recently broken open and robbed. He then went to his room, taking his money with him, and about breakfast next morning he, in the office, handed the package to appellee, Birch, saying to him he wanted him to put it in the safe. Birch took it, and started to the room in which the safe stood, and then told him his money would not be secure in his iron safe, for it had been broken open and robbed a short time before that, and said he would not be responsible for any money put in that safe; to which appellant made no reply; and about one week after this conversation some one opened the safe by means of a false key, and stole appellant's money; that the morning after the money was stolen he heard Birch tell appellant that he told him, when he took his money, he would not be responsible for it if it was stolen, and he replied he knew he did, but he thought he was joking.

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This witness proved that he went to bed about 10 o'clock of the night the money was stolen; put out all the lights, and no watch was kept at the house. There were three doors to the room in which the safe was located, and a man named Heberman, the yard-master as he was called, and two hands employed about the stock-yard, usually slept in the room; that these two hands were transient, and such men as might be hired from time to time; that after the front door of the house was closed, which was usually done about 9 or 10 o'clock at night, the entrance into the house by guests and others was through the room in which the safe stood, and in which Heberman slept; that he was an employe of appellees; and if he had retired before all the guests were in, he got up and let them in as they came to the door; that witness was employed as clerk by appellees on the 22d October, 1867; before his employment a man named Miner had been their clerk, but had been discharged about ten days previously.

It was proved that Miner had procured a key to be made, by the key of appellee's safe, with which it could be opened, and that after the safe was robbed he had a bill for fifty dollars on a Louisiana bank, which appellant identified as his, and that it was in the package of money which he had given to Birch to be put in his safe.

Dunn proved he was in company with appellant when he asked the clerk of the Shelby House, on the night of their arrival, to take charge of his money; and the clerk replied that he did not have the key, and the safe had been robbed a short time before; and he could take his money to his room with him, where it would be as secure as it would be in the safe. He kept his money that night, and next morning he was present when appellant

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handed the money to Birch, who was at the time behind the counter, and remarked: "My safe was robbed a few nights ago. Suppose this money is lost, who will be responsible?" Plaintiff replied: "Don't you keep a public house? Of course you will be responsible."

Other evidence was heard in the trial; but further reference to it is not necessary for the purposes of the investigation and determination of the questions before this court.

The first instruction asked by appellant was refused, and is this in substance: That defendants are responsible for the good conduct of their employes; and if the jury believe from the evidence that defendants intrusted Minor with the key of their safe while he was employed by them, and he, while so intrusted, procured another key to be made, by means of which he entered their safe and took therefrom plaintiff's money, then the law is for him.

It is said by Parsons on Contracts (*2d vol. p.* 146), public policy imposes upon an innkeeper a severe liability. The later, and, on the whole, prevailing authorities, make him an insurer of property committed to his care against every thing but the act of God, or the public enemy, or the neglect or fraud of the owner of the property. He would then be liable for a loss occasioned by his own servants, by other guests, by robbery or burglary, from outhouses, or by rioters or mobs; nor would it excuse him if he were sick, insane, or absent at the time, for he is bound to have competent servants and agents; but it is a good defense if the loss was occasioned by the negligence of the owner.

And this court, in *Weisenger vs. Taylor, &c.* (1 *Bush*, 276), said: "The common, like the civil law, but even more stringent, exacts of innkeepers, as bailees of the

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baggage and goods of their guests, extraordinary care, and imposes on them a responsibility nearly commensurate with that of common carriers, approximating insurance of such articles when confided expressly or impliedly to their custody and care; but whenever the guest assumes the custody and control of his goods in such a way as to indicate that he does not trust the innkeeper, and concedes to him no control, they are not in the implied custody of the innkeeper, and he is, therefore, not responsible, unless they shall be stolen by some of his own household, whose honesty and fidelity he is presumed to guarantee.

The evidence conduces strongly to the conclusion in this case that the safe was entered by means of a false key; and also, that such key had been procured by Minor while he was an employe of appellees; and that their safe had been previously entered and robbed by such a key. There is no evidence that they had procured the key to be delivered up to them, and they had not changed the lock on their safe. With these facts, and the knowledge of their existence, they took the money of appellant to keep for him. He had surrendered the custody of it to them, and they were liable, unless they took extraordinary care of it.

Instruction No. 1 is not expressed in the most felicitous and appropriate terms; but it contains, in substance, a proposition of law applicable in some respects to the evidence adduced on the trial, and should have been given.

Instruction *No.* 2 asked for by appellant should also have been given; and, as instruction No. 3, given on motion of appellees, is in conflict with it, this last instruction should have been refused. Besides, by this 3d instruction, emphatic importance is given to the facts

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proved by the witness Spencer as to the conversation which took place between appellant and Birch when the money was handed to the latter, while that proved by Dunn is ignored.

Wherefore, for the errors stated, the judgment is reversed, and the cause is remanded, with directions to award a new trial, and for further proceedings not inconsistent with this opinion.

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CASE 58– PETITION EQUITY—FEBRUARY 3.

Cessna, &c., vs. Cessna's adm'r, &c.

APPEAL FROM LARUE CIRCUIT COURT.

1. Vendor, by a writing for a valuable consideration, bound himself to convey a tract of land to the vendee "*and his lawful children.*" At the date of the writing the vendee had three children, and after that time three more were born to him. The six children are entitled to six sevenths of the tract of land.
2. "CHILDREN," when inserted in a conveyance, or a bond for a conveyance, of land, *is a word of purchase* and not of limitation, and by its insertion in the bond to their father, as there were children then in being, they were parties vendees, just as much as if they had been specially named; and as children were born to him, after the date of the bond, the estate would open up to them, and *such after-born children would take their respective shares.*

M. H. COFER, For Appellants.

W. B. READ, For Appellees,

CITED—

2 *Duvall*, 547; *True vs. Nicholas.*

2 *Metcalfe*, 341; *Johnson vs. Johnson.*

14 *B. Mon.*, 570–71.

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JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

William Cessna, in consideration—partly for love and affection—for nine hundred and thirty-three dollars and thirty-two cents, and for board and care, covenanted with his son, W. W. Cessna, to convey to him "*and his lawful children*" a certain tract or parcel of land, described in a writing evidencing the contract.

At the date of the writing W. W. Cessna had three children, and after that time three more were born to him. He and his father both died without any conveyance having been made for the land described in said covenant; and this is a controversy between the children of said W. W. Cessna and his widow and creditors, whether the children are entitled to any part of the land under said contract.

The court below adjudged to the children the one half of said land, and that the other half was liable to the payment of the debts of W. W. Cessna, subject to his widow's dower. From that judgment the children of W. W. Cessna have appealed, and his creditors and widow prosecute a cross-appeal.

Appellants insist that they are entitled, as joint purchasers, to six sevenths of the land, while cross-appellants contend that the words "*lawful children*" are synonymous with the words "*heirs of the body*," "*heirs lawfully begotten of the body, &c.*," which have been repeatedly construed by this court as appropriate words of limitation, creating an estate tail, which, by the statute of this State, is converted into a fee simple; and there being nothing in the writing relied upon in this case authorizing an inference that the words were used in a sense different from their technical legal signification, they should be so regarded, and that, consequently, the children could take nothing except as heirs of W. W. Cessna.

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This argument is founded on a misapprehension of the meaning and legal effect of the word "children," which is a word of purchase and not of limitation, and, by its insertion in the bond, as there were children then in being, they were parties vendees just as much as if they had been specially named.

The legal and technical signification of the words of the instrument under consideration being altogether different from those construed in *Johnson vs. Johnson* (2 *Met.*, 331), and *True vs. Nicholas* (2 *Duvall*, 547), consequently there is no analogy between the cases.

As children were born to W. W. Cessna after the date of the writing aforesaid, the estate would open up to such after-born children, and they would take their respective shares.

Wherefore, the judgment on the original appeal is reversed, and the cause is remanded, with directions to render judgment in favor of the appellants for six sevenths of said land, and for further proceedings consistent with this opinion. The judgment is affirmed on the cross-appeal.

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CASE 59—PETITION EQUITY—FEBRUARY 3.

Flournoy, &c., vs. Flournoy, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

A testator died without children, leaving a widow, a brother, and three sisters, and a will containing the following among other provisions:

First. A devise to his widow (who was his executrix) of sole possession of all his estate during her life.

Second. A direction to pay his debts by the sale of certain specified property.

Third. A direction to his executrix to sell his southern property, and of the proceeds "retaining one half for her sole use and benefit; the other half to be divided in equal proportions between my brother and sisters, or, in case of the death of any of them, to their children, in such *pro rata* division as the law makes in such cases; provided, however, that from the portion going to" his brother and each of his sisters, the several debts which his brother and the respective husbands of his sisters owed to testator, should be subtracted, the husbands of the sisters being dead.

Fourth. Of his Kentucky farm, negroes, &c., or so much thereof as might remain after paying debts, as before provided, he devised to his widow one half for life, with "the right to will in fee simple one half of all my property left; the other half to be divided among my brother and sisters or their children, as above described;" provided, that if his widow should marry, then all his property to be sold "and divided amongst my brother and sisters," first paying to his widow five thousand dollars as her portion.

Held—1st. That, under these provisions of the will, the debts owing the testator by his brother and brothers-in-law are not included in the devise to his widow, but to go to his brother and sisters, to be thrown into *hotchpot* for equalizing among themselves their distributive portions.

2d. That the will does not vest in the widow, a freehold title to the southern property, but the mere possession and curation without title; and the title thus undisposed of by the will descended to the brother and sisters as heirs.

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3d. That the devises to the brother and sisters were absolute, the contingent provision for the children, being intended to apply only to those of such of the primary devisees as might not survive him, and, therefore, could not take under the will.

F. K. HUNT and
R. W. WOOLLEY, For Appellants,

CITED—

1 *Jarman on Wills*, *p.* 324; *Powell on Devises*, *p.* 421.
2 *Simon*, 524; *Waits vs. Templer.*
4 *Chitty's Equity Digest*, *p.* 3150.
1 *Bush*, 515; *Flournoy's devisees*, *&c.*, *vs. Flournoy's ex'r*, *&c.*

BUCKNER & HUSTON, For Appellees.

[Brief not in records.]

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Victor M. Flournoy, a childless citizen of Fayette county, Kentucky, and owner of a large and valuable homestead farm in that county, a plantation in Washington county, Mississippi, three tracts of land in Arkansas, and a large personal estate, died in the year 1865, leaving a widow and a brother and three sisters, his next of kin, and a holographic will, published the 10th of January, 1865, and containing substantially the following among other immaterial provisions:

1. A devise to his widow of sole "*possession*" of all his estate during her life, "*with the provisions and restrictions*" afterwards prescribed.

2. A direction to pay all his debts by the sale of his bank stock or of any of his personal property in Kentucky, including his cash notes, and the sale, if necessary, of a portion of his Fayette land.

3. A direction to his executrix to sell, after the close of the then existing civil war, his southern property, and of

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the proceeds, "retaining one half for her sole use and benefit; the other half to be divided in equal proportions between my brother and sisters, or, in case of the death of any of them, to their children, in such *pro rata* division as the law makes in such cases; provided, however, that from that portion going to my sister, Betsy J. Johnson, the sum of ten thousand dollars, with its interest, due me from Captain Henry Johnson, is to be subtracted; also, from my brother's portion, the sum of six thousand dollars loaned money, due me, with interest at eight per cent. per annum from this date until paid; also, from the portion of my sister, Emily M. Ward, the amount of R. J. Ward's note of about five thousand dollars, with the interest accrued thereon."

4. So much as remains of what is now material is as follows: "As it respects my Kentucky farm, negroes, stock, &c., on said farm, it is my will that so much of it as may remain after paying my debts, as above provided, my wife, Elizabeth J. Flournoy, is to have and hold for her sole use and benefit, so long as she shall live, and at her death shall have the right to will, in fee simple, one half of all my property left; the other half to be divided among my brother and sisters, or their children, as above described; provided, however, and I so distinctly understand it, that all the advantages, privileges, and benefits granted to my wife apply, and are to be employed by her, only so long as she remains a widow. If she marries, then, and in that case, it is my will that all my property is to be taken possession of by an administrator to be appointed by the court, and as soon as possible sold and divided amongst my brother and sisters, first paying to my widow, or whoever she may then be, the sum of five thousand dollars, as her portion of the same."

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The widow, as executrix and devisee, claiming more than the testator's brother and sisters would concede, brought this suit in equity against them for obtaining judicial interpretation of the will and umpirage as to the conflicting claims of the parties.

When the will was published all the testator's sisters were widows in needy circumstances, as stated in the petition of the executrix. The slaves were all emancipated by the constitutional amendment for abolishing slavery. None of the Southern lands, except a small tract in Arkansas, have been sold; and the debts may be considered as paid without touching either the Fayette farm or the testator's claims on his brother and deceased brothers-in-law. On the facts thus presented the circuit judge decided that the recited claims on the testator's brother and brothers-in-law constituted a portion of his estate as devised to all the parties to this friendly litigation; and, therefore, adjudge to the widow one half as legatee, and which half, adding interest, amounted to about fifteen thousand dollars; and as to the lands, decided that the interest of the brother and sisters was only a contingent remainder, defeasible by their death before division, and, in that event, vested in their children.

This appeal requires a revision of the decree on both questions involved in it—

1. "Cash notes," mentioned as a portion of the property dedicated to the payment of debts, may not apply to the advances made to the testator's brother and brothers-in-law, because it does not appear that the testator held the note of any of them except R. J. Ward; nor are those advances included in the devise to the widow, because that devise is made subject to subsequent limitations; and those sums are afterwards expressly given to the

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brother and widows of the deceased brothers-in-law, and *treated as advancements*, to be thrown into *hotchpot* for equalizing among themselves the distributive portions of the testator's *brother and sisters*. That fund cannot, therefore, be consistently considered assets for the payment of debts; nor, as it is expressly disposed of otherwise, can it be constructively included in the beneficial bequest to the widow? But this court must treat it, as the testator evidently intended, as an advancement, to be subtracted from the portions of those to whose use it had been made, and whom, in their admitted destitution, he did not intend to harass by an useless and oppressive attempt at unnecessary coercion, even if the gift of the fund to them should subject his homestead to sale for debts, and, therefore, the widow is entitled to no portion of it as assets or otherwise; and, consequently, the decision of the circuit court on this subject was erroneous.

2. The testamentary disposition of the southern property does not vest in the widow a freehold interest, but merely gives to her the possession and curation, without title *in re;* and the title thus undisposed of by the will descended to the testator's brother and sisters as his heirs, and only heirs. This interpretation, quite obvious on the face of that devise, is concluded by the significant fact that, as to the homestead farm, the devise to the widow is expressly a freehold title during her life or widowhood.

Then the entire fee in the southern lands being in his heirs when he died, we could not reasonably presume or admit that the testator intended that the subsequent death of any one of those heirs and devisees should translate his or her interest to children, not as their heirs, but as his devisees. It is much more reasonable to suppose that the contingent provision for the children was intended to apply only to those of any of his primary devisees who

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might not survive him, and, therefore, could not take under the will, and whose children could not take representatively or otherwise, without such an express provision as the will makes on that contingency. The children, more remote and comparatively strangers, perhaps unknown and even unborn, only representatively called for the testator's bounty. His first and controlling object was to provide for his brother and sisters, whom he regarded with peculiar affection, and, therefore, made the recipients of one half of his large estate in any event, and of the whole of it, except five thousand dollars, in the event of his wife's marriage.

And this contingent devise of nearly all, to his brother and sisters, is without limitation, and does not even allude to their children, thus indicating his pervading purpose to devise the fee absolutely to his brother and sisters living at his death, and his contemplation of their children as their representative devisees *per stirpes;* and even then, only "if the parent, not surviving him, should never acquire a vested interest in his estate, or become personal beneficiary under his will.

The spirit and context of the will point to this interpretation of its provisions; and we cannot imagine any consistent motive for inducing such a testator, animated by such fraternal affections as flow throughout his whole will, to limit the interest of his brother and sisters to their lives, and thereby cripple their means of comfortable support. Authorized by these considerations, and harmonizing with the testator's general intent, the true construction of the second clause respecting his southern property, and providing for distribution annually among his brother and sisters, "or, in case of the death of any of them, to their children," seems to include the children of such only as should die before he died, and not such

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as, by surviving him, would be vested with a fee. To extend that substitutional contingency to the times of successive distributions, would be motiveless and incongruous, and not adaptable to the subtraction of advances to the brother and two of the sisters, to whom alone that provision fitly applies; and any other construction might frustrate the testator's purpose of securing to them, not their successors, comfortable maintenance by the proceeds of the southern estate dedicated especially to that provident purpose, which might be defeated by a contingent limitation, which might prevent prudent or necessary anticipation by their own sale or other acts.

It seems to us, therefore, that the fee in the southern estate, once vested by the testator's death, is not defeasible on any prescribed or contemplated contingency, except the sale by the trustee, or for debts as authorized.

The same conclusion is even more certain and satisfactory as to the Fayette farm, which the third clause devised to the widow for life or widowhood, one half in remainder to the testator's brother and sisters.

And the fact that, in the event of her marriage, the whole estate, in both Kentucky and the South, is devised to the testator's brother and sisters, *absolutely and without any contingent remainder to their children*, proves his general and controlling intent in his whole will. If, on that contingency, the entire estate belongs to the brother and sisters *absolutely without any limitation*, why would the testator have limited the smaller estate South, in respect to which, as being smaller, the provident purpose of the will would make an absolute title more needful? And why, in the event of his brother and sisters getting all, did he make no ulterior provision for their children?

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This consideration alone should control the construction of the devise of the southern property, which should be construed with the clue furnished by the spirit of the whole will, and by the fact also that it was written by a man unskilled in the technics of the law.

Our allodial tenures, unlike the feudal technicality of the common law, is moulded by statute into a more simple and consistent system, which needs no *scintilla juris* to nourish the *fee which must always exist somewhere else than in the clouds. In this case it is in the appellants, or nowhere;* and, according to the testator's evident purpose, it is not defeasible by any contingent remainder in children, and may be disposed of indefeasibly whenever and however the appellants may choose.

Wherefore, the judgment is reversed, and the cause remanded for the substitution of this opinion for that of the circuit court, so far as we have adjudged the rights of the parties.

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CASE 60—PETITION EQUITY—FEBRUARY 3.

Mahoney, guardian, vs. McGee.

APPEAL FROM LARUE CIRCUIT COURT.

1. The "*Act to revive and continue in force acts and amended acts to amend the third and fifth articles of chapter eighty-six, Revised Statutes,*" approved January 12, 1866 (*Myers' Sup.*, 750), *has both a retroactive and prospective operation.*

   When the proceedings for the sale of infant's real estate, under chapter 86, have been irregular, said act gives to the chancellor power, when he ascertains that it would be right, by proper proceedings, to mature, perfect, and sustain the sale, and secure to the purchaser the land he bought, and to the ward the price bid, and thereby prevent injustice to either party.

2. When the guardian offered to file an amended petition, making the necessary allegations and the proper parties, for the purpose of curing any defects in the proceedings for the sale of his ward's land, the circuit court erred by sustaining the purchaser's exceptions to the sale, and also by sustaining a demurrer to the amended petition of the guardian. (*Boyce and wife vs. Sinclair*, 3 *Bush*, 264.)

BROWN & MURRAY and
COFER & BUSH, For Appellant,

CITED—

Revised Statutes, chap. 86.
2 *Duvall*, 273; *Bush, &c., vs. Bush, &c.*
18 *B. Mon.*, 560; *Pond vs. Doneghy.*
Civil Code, sec. 55.
16 *B. Mon.*, 296; *Grigsby vs. Strother's heirs.*
6 *Dana*, 466; *Vowle's heirs vs. Buckman.*
9 *Dana*, 533; *McKee's heirs vs. Hahn & McKee.*
7 *B. Mon.*, 61–2; *Lampton vs. Usher's heirs.*
Act of Jan. 12, 1866; *Act of March* 1, 1862.
Act of March 3, 1863, *Myers' Sup.*, 422 *to* 425, *and* 750.

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WM. JOHNSON, For Appellee,

CITED—

Rev. Stat., chap. 86, *secs.* 1, 2, *art.* 3.
16 *B. Mon.*, 296; *Carpenter, &c., vs Strother's heirs.*
18 *B. Mon.*, 781; *Wyatt, &c., vs Mansfield's heirs.*
18 *B. Mon.*, 391; *Barrett vs. Churchill.*
2 *Met.*, 516; *Wills vs. Cowherd.*
1 *Met.*, 424; *Megowan, &c., vs. Way, &c.*
1 *Met.*, 262; *Barber's adm'r vs. Hopewell, &c.*
4 *Met.*, 41; *Woodcock vs. Bowman.*
Civil Code, 546 *to* 556.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The original petition for the sale of the infant ward's land was defective in not making him a party, and, therefore, the decretal sale was irregular. But when the purchaser, McGee, excepted to the report of the sale and resisted its confirmation, appellant, as guardian, offered to file an amended petition, making her ward and the purchaser parties, setting out that she had, at his solicitation, contracted to him the land at two thousand seven hundred and fifty dollars; and that she then told him she had no right to sell it, whereupon he said he would consult a lawyer whether a decree of sale could not be obtained, and have the proper proceedings taken, which he did, and procured the original petition to be filed; that the decree was obtained, and he bid the agreed price, which was a full and fair one, and advantageous to her ward; that, pursuant to the agreement, she had let him into possession, and he had enjoyed the place; that, upon the faith of this sale, she had purchased a house and lot in town, where she had gone with a view to the education of her ward and only child, a boy between sixteen and seventeen years

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of age, and who was anxious that the sale should be confirmed. The court refused to let it be filed until he passed upon the exceptions, when the next day, after sustaining the exceptions and setting aside the sale, it was filed, and then he sustained a demurrer to it, and this appeal seeks a correction of these errors.

The temporary statute of September 30, 1861 (*Myers' Supplement*, 424), which was of only two years' duration, was enacted to remedy this precise defect in such proceeding, and being found so beneficial in its operation by the subsequent enactment of January 12, 1866 (*same book*, 750), it was revived and made permanent, and enacted as part of chapter 86, Revised Statutes; and as said by this court in *Boyce and wife vs. Sinclair* (3 *Bush*, 264), it was made a permanent policy, after sufficient experience, for the purpose of remedial justice, and to correct the evils of a too rigid judicial construction of the rigid enactment found in said chapter 86.

This statute could only answer the real objects of its enactment by giving it both a retroactive and prospective operation. It disturbed no vested interest, conflicted with no equitable right, but only gave the chancellor power to inquire into the defects in such proceedings, and to ascertain whether it would be equitable to uphold the sale; and if so, then, upon proper proceedings, to mature and perfect the title; in other words, it only gave the chancellor power, when he ascertained that it would be right to sustain the sale, to secure to the purchaser the land he bought, and to the ward the price bid, and thereby prevent injustice to either party.

If the allegations of this petition be true, and so they must be regarded on demurrer, there can be no doubt but the chancellor should perfect the title and compel the purchaser to abide his contract.

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Wherefore, the judgment setting aside the sale is reversed, with directions to overrule the demurrer to said amended petition, and to ascertain the facts therein alleged, and for further proceedings consistent herewith.

CASE 61—PETITION ORDINARY—FFBRUARY 4.

Kennedy vs. Ashcraft.

APPEAL FROM LARUE CIRCUIT COURT.

1. A mare was borrowed to ride about three miles, and instead of doing so, the borrower put her in a buggy and drove her twelve or fourteen miles, where she was watered; put in a stable and fed, without any attention or care on the part of the borrower. The mare was found dead next morning in the stable. The owner recovered a judgment in the circuit court for the value of the mare. That judgment is affirmed. See the opinion for a review of the law, facts, and instructions given and refused in the circuit court.
2. A borrower is liable for any neglect whatever in care and use. He is bound to extraordinary diligence, and is responsible for slight neglect. (*Story on Bailments, secs.* 237, 239.) He ought to exert all possible care, such as the most careful apply to their own affairs; and he is liable not only for slight, but for *the slightest fault.* (*Pothier.*)
3. The borrower of a mare to ride about three miles, instead of doing so, became a bailee in his own wrong by putting her in a buggy and driving her twelve or fourteen miles. The mare having died whilst thus in possession of the bailee in his own wrong, he is liable for her value, unless he makes it clearly appear that the loss resulted inevitably from causes disconnected with the improper use and bailment.
4. Whether the relation between the illegal act and the damage sustained was sufficiently proximate to create a liability on the part of the wrong-doer, and to sustain the action, "*has been treated as a question of law to be decided by the court*, and not as a question to be determined by the jury after determining the facts by which the relation is demonstrated."

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M. H. COFER, For Appellant,

CITED—

Jones on Bailments, 6, 7, 22.
18 *B. Mon.*, 7; *Jackson vs. Robinson.*
Story on Bailments, secs. 412, 413.
Pothier on Obligations, 143, 627.
6 *Bing.*, 716; *Davis vs. Garnett.*
12 *B. Mon.*, 410; *King vs. Shanks.*

W. B. READ, For Appellee,

CITED—

1 *Parsons on Contracts, p.* 591, *note.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellant borrowed from appellee a mare to ride some three miles in the country, and instead of doing so, put the mare in a buggy, and drove her some twelve or fourteen miles, to a neighboring town, taking with him another man. The mare was unharnessed by the landlord, and ridden down to water by his son, a small boy, and then put into the stable and fed, without any attention or care by the appellant, and next morning was found dead, being much swollen, which, in the opinion of several witnesses, indicated that her disease was colic.

Upon trial, the jury found the value of the mare for appellee, and the court having refused a new trial, this appeal seeks a correction of alleged errors.

If there were no reversible errors in the instructions when applied to the evidence, the judgment must stand.

By the first instruction, the jury were directed, that if the letting was a loan, and not a hiring, "*the defendant would be liable for any neglect whatever in the use and care of the animal.*"

In Story on Bailments (*sec.* 237) it is said: "As the loan is gratuitous, and exclusively for the benefit of the

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borrower, he is, upon the common principles of bailment already stated, bound to *extraordinary diligence;* and, of course, he is responsible for *slight neglect* in relation to the thing loaned."

Pothier says, that it is not sufficient for the borrower to exert the same ordinary care which fathers of families are accustomed to use about their own affairs; but that *he ought to exert all possible care*, such as the *most careful persons* apply to their own affairs; and that he is liable not only for *slight*, but for the *slightest fault.*

Again, Story (*sec.* 239) says: "What shall be deemed slight neglect or want of extraordinary diligence, must depend upon the particular circumstances of each case."

The court was therefore right in saying to the jury that the "defendant would be liable *for any neglect;* and if they believed the death of the mare resulted *from any degree of improper usage or want of attention*, they ought to find for plaintiff."

By the second instruction, the jury were directed, that if the letting was on hire, "the defendant was only bound to use and feed and attend to her, with such care as *a man of ordinary prudence* would bestow on his own property of the like kind under such circumstances; and if the defendant *did bestow such ordinary care and diligence* in the use and care of the mare, they ought to find for defendant." This instruction, though not so pertinently worded as might have been, yet evidently means, that if the defendant used and cared for the mare with as much diligence as is common with men of ordinary prudence and discretion, then the law was for defendant, and does not bring the case within the rule, as recognized by this court in *Jackson vs. Robinson* (18 *B. M.*, 7), wherein the lower court, in a case of bailment for the mutual benefit of both parties, instructed the jury to find for

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plaintiff, if the defendant was guilty of greater negligence than a *prudent* man would be ordinarily guilty of," which, in effect, told the jury that the defendant was responsible for such ordinary care as positively prudent men would have taken of such property under alike circumstances, instead of saying he was only liable for *such ordinary care* as *ordinarily prudent men* would have exercised under such circumstances; or, otherwise, to use the direct language of the court, "*such as was usual with the common run of men*," and which rule of responsibility was improperly applied to such a bailment. We regard this second instruction as tantamount to what this court recognized as the correct rule of responsibility in bailments for the mutual advantage of the parties.

The fourth instruction directed the jury, that if the defendant borrowed the mare to ride two or three miles in the country, and that he drove her in a carriage some twelve or fourteen miles, and that whilst at the town of New Haven the mare died, that "*the defendant is liable for her value.*"

It is urged that this made the defendant liable at all events, though the death may have resulted from natural causes, and would have occurred even if used precisely as was expected, or not used at all, and perhaps may technically be liable to such objection; but when applied to the facts of this case, could not have misled the jury. Had there been evidence indicating that the death was from natural causes, which must have occurred at any rates, there would have been potency in the objection. Whilst some authors suggest such a loss resulting inevitably from causes disconnected with the improper use and bailment, or perhaps forming an exception to the general liability of a bailee in his own wrong, but which none say has ever been yet settled as a rule, it must

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clearly appear that such was the case, as this court, in *Kelly vs. White* (17 *B. Mon.*, 141), held, in relation to an instruction of similar import, "the instruction then is right so far as relates to this case, and the error, if any, could not have been prejudicial." The court therein further says, whether the relation between the illegal act and the damage sustained was sufficiently proximate to create a liability on the part of the wrong-doer, and to sustain the action, "*has been treated as a question of law to be decided by the court*, and not as a question to be determined by the jury after determining the facts by which the relation is demonstrated."

If this be correct, we cannot say, in view of all the facts developed, that the court erred in determining that the death of the mare, and consequent damages by reason thereof, were sufficiently approximate to render the defendant liable if he was a bailee in his own wrong, as submitted in the first part of the instruction for the jury to ascertain.

The first instruction refused, asked by defendant, was substantially given in instruction No. 2; the second refused instruction is, perhaps, technically correct law, but not applicable to this case, especially after the court had determined the death of the mare as sufficiently proximate to defendant's use, and made him responsible if such use was illegal and in his own wrong.

We have, therefore, failed to perceive any error in giving or refusing instructions as applicable to the facts of this case, hence, affirm the judgment, with damages.

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CASE 62—PETITION ORDINARY—FEBRUARY 4.

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Morel vs. Mississippi Valley Life Insurance Company.

APPEAL FROM KENTON CIRCUIT COURT.

A party, who was insured against accidents, "inadvertently put his arm a short distance out of the window of a railroad car, when his hand came in contact with a post standing near the track of the road, whereby the middle finger of his right hand was so badly injured as to render him wholly unable to practice his profession, of surgeon, for the period of twenty-six weeks or more." *Held*—That the injury was produced by the fault of the assured, and he thereby deprived himself of all right to compensation.

WM. ATWOOD, For Appellant,

CITED—

1 *Bouvier's Law Dictionary*, "*Accident.*"

5 *Hur. & Nor. Exc'r R.*, 546; *Hooper vs. Accidental Death Ins. Co.*

21 *Penn. R.*, 203; *New Jersey Railroad vs. Kennard.*

4 *Allen Mass.*, 388; *Johnson vs. Berkshire M. F. Ins. Co.*

13 *B. Mon.*, 318; *Powell vs. Fireman's Ins. Co.*

CARLISLE & O'HARA, For Appellee.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Appellant alleged in his petition, that on the 3d of July, 1867, he was in the city of Atlanta, Georgia, and being about to start to Kentucky, he, in consideration of twenty-five cents, obtained a policy of insurance against

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accidents from appellee, an incorporated company, chartered by an act of the General Assembly of Kentucky, the policy to continue a specified time, the terms of which are as follows: That appellee, in consideration of the sum named, insured him in the amount of five thousand dollars, and promised to pay the same to the legal claimant within sixty days after proof that the assured, by any accident within the meaning of said policy, had sustained any personal injury during the term of said insurance, and such injuries shall have occasioned death within three months after the happening thereof; or, in case of personal injuries within the same period, by accident not fatal, but causing total disability, the company will pay the assured twenty-five dollars per week, for the term of such disability, not exceeding twenty-six weeks.

He further alleged, that while performing said journey, and before the termination of the period for which he was assured, on the railroad from Chattanooga to Nashville, he met with an accident from having "inadvertently" put his arm a short distance out of the window of a car, when his hand came in contact with a post standing near the track of the road, whereby the middle finger of his right hand was so badly injured as to render him wholly unable to practice his profession of surgeon for the period of twenty-six weeks or more. Of which injury he made the requisite proof in due time, gave notice to appellee, and performed all conditions required by the stipulations of said policy to be performed by him, and concludes with a prayer for judgment against appellee for six hundred and fifty dollars, with interest from the 3d of October, 1867.

A demurrer was filed to the petition by appellee, which was sustained, and appellant having declined to plead

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further, his petition was dismissed, and he prosecutes this appeal.

It is apparent, from the statement in the petition, that appellant put his arm out of the widow of the car, while the train was moving with its usual velocity, without the slightest necessity for doing so; but, as his own statement imports, he carelessly put his arm out of the window of the car in which he was sitting, and while in that position the accident happened.

The injury did not result from any of the dangers common to passengers on that and other railroads, but resulted from the dangerous position in which he had needlessly and negligently placed his arm—an injury which, if not to be expected from the exposed position of the hand, was at least probable.

If appellant had kept his arm inside of the car, it is perfectly certain he would have received no injury; and as it was produced by his own fault, he thereby deprived himself of all right to compensation. The demurrer was, therefore, properly sustained.

Wherefore, the judgment is affirmed.

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CASE 63—PETITION EQUITY—FEBRUARY 5.

Vandiver, &c., vs. Hodge, adm'r.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. The act of May 31, 1865, to take effect May 31, 1866 (*Myers' Supplement*, 295), providing that the provisions of chapter 63 of the Revised Statutes, entitled "*Limitations of Actions and Suits*," shall extend to and embrace all cases, whether the right of action accrued before or after the Revised Statutes took effect, *as it left twelve months for suing on pre-existing causes of action, is constitutional.*
2. The unanswered plea of the statute of limitations, is a *prima facie* bar to a judgment on notes executed in 1848, for land, the cause of action having existed more than fifteen years before the commencement of the suit, and the notes being secured by a lien reserved in the conveyance; as no action can be maintained on the notes, the lien cannot be enforced.
3. The lien reserved in a conveyance of land to secure purchase notes is only a mere security, a mere incident to the debt, which is the principal, and cannot be enforced if the debt itself is paid or barred by time.

STEVENSON & MYERS, For Appellants,

CITED—

Civil Code, sec. 161.
Champerty act of 1824, 1 *M. & B.*, 285.
15 *B. Mon.*, 140; *Britton vs. Duling.*
15 *B. Mon.*, 636; *Conner vs. Ragland.*
2 *Met.*, 164; *Collins vs. Merritt.*
20 *N. H.*, 369; *Morrison vs. Underwood.*
MSS. Opin., Jan., 1856; *Brannamann vs. Palmer.*
MSS. Opin., Jan., 1855; *French vs. Saile.*
MSS. Opin., Jan., 1857; *Morehead vs. Halsell.*
Act of May 31, 1865, *Myers' Supplement*, 295.
2 *Bush*, 231; *Lockhart vs. Yeiser.*

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GEO. B. HODGE, For Appellee,

CITED—

Revised Statutes, sec. 8, *chap.* 12.
Act of 1798—*Champerty.*
4 *Dana*, 135; *Henly vs. Gore.*
3 *B. Mon.; Breckinridge vs. Moore.*
5 *J. J. M.*, 671; *Percifull vs. Hurd's heirs.*
7 *J. J. M.*, 299; *Ligon vs. Alexander.*
1 *Dana*, 576; *Galloway vs. Hamilton.*
3 *Dana*, 56; *Royal vs. Miller.*
1 *J. J. M.*, 401; *Pugh vs. Bell.*
1 *J. J. M.*, 370; *Overstreet vs. Bate.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On the 5th of September, 1868, the appellee, Hodge, as administrator of John W. Tibbatts, deceased, brought this suit against the appellants on three promissory notes executed by them in the year 1848 for land sold and conveyed by the intestate to them, with a reservation of a lien for securing payment. The petition showed that Hodge was qualified as administrator in August, 1852, and that the last of the notes had become due more than fifteen years before the institution of the suit, and prayed for a judgment on the notes, and an enforcement of the lien.

The answer, admitting the allegations, relied on three defensive grounds, the last of which pleads the statute of limitations. The circuit court sustained a demurrer to the entire answer, and rendered judgment for the amount of the notes, and also for enforcing the lien.

Being of the opinion that the action is barred by time, we shall not consider either of the other defenses.

As the retrospective enactment of 1865 (*Myers' Supplement*, 295) left twelve months for suing on causes of

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action pre-existing, it constitutionally operates and makes the limitation fifteen years in this case. Consequently, as the administration and cause of action had both existed more than fifteen years when this suit was commenced, the unanswered plea is a *prima facie* bar to a judgment on the notes. And no action being maintainable on the notes, the lien, which is only a mere security, cannot be enforced. There is no express trust. The lien is only a peculiar sort of resulting trust; and the statute of limitations applies to all implied trusts. Besides, had the trust been express, and not within the statute, still it could not be enforced as the mere incident to the debt, which is the principal, if the debt itself is paid or barred by time.

Wherefore, the judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

CASE 64—MOTION—FEBRUARY 9.

Williams vs. Smith.

APPEAL FROM HARRISON CIRCUIT COURT.

1. When a sale of personal property, upon which an execution is levied, has been suspended, by persons not defendants in the execution, as provided by section 713 of the Civil Code, any equitable cause can be shown against judgment on such bond, in whole, or any part thereof.
2. When partnership property has been levied on to satisfy an execution against one of the partners, a settlement of the partnership should be made, and only the interest of that partner, subjected to sale, if any interest remains to him on such settlement.

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3. It is the duty of the sheriff levying on joint property, to satisfy the separate debt of one of the owners, first to notify in writing the other joint owners, and if they fail to give the officer notice of their claim, as required by the act of February 12, 1858 (*Myers' Code, p.* 202), he may then proceed to advertise and sell the property so levied upon. If the other joint owners suspend the sale by executing bond as authorized by section 713 of the Civil Code, this will be deemed as a waiver of the notifications prescribed in said act, and the cause may be finally disposed of upon equitable principles.

JOHN S. BOYD, For Appellant,

CITED—

18 *B. Mon.*, 663; *Watson vs. Gabby.*
Civil Code, sec. 484.

W. W. TRIMBLE, For Appellee,

CITED—

8 *B. Mon.*, 485; *White vs. Woodward.*
18 *B. Mon.*, 663; *Watson vs. Gabby.*
Civil Code, sec. 202.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellee having an execution against Redmon, the officer levied it upon some cattle which Hinde, Drake & Co. claimed to own, and they executed a claimant's bond, with appellant as their security, under section 713, Civil Code.

Smith, upon proper notice, prayed judgment against the obligors in the bond, whereupon the issue was submitted to the court, which rendered judgment thereon for eight hundred and forty dollars, with interest and costs and ten per cent. damages, which appellant seeks to reverse.

The evidence sufficiently establishes that Redmon being insolvent, and his wife owning an undivided half of forty acres of land, on which was established a distillery and

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fixtures, and Mrs. Hinde owning the other half, it was agreed between Mr. Hinde, her husband, Drake, and Mrs. Redmon, to make a partnership for distilling purposes; that Mrs. Redmon was to furnish one half the distillery and fixtures, and have one third the profits, and bear the same part of the losses, and that Hinde and Drake were to furnish the other part of the machinery, fixtures, &c., and the means to carry it on, and have two thirds the profits, and bear a *pro rata* of losses. Mr. Redmon was to conduct the business without salary.

That he (Redmon) took out license from the proper revenue officer of the United States in his own name, to conduct the business, which he says was done in order to give the firm the benefit of his trade-marks in the market, he being well known as a manufacturer; that the firm furnished him with thirty-five dollars to pay in advance on said cattle, and he gave his individual note for the balance, which the firm afterwards paid; and that the establishment had sunk one thousand four hundred dollars instead of making profit; that slopping cattle was a means of profit.

The sheriff's return on the execution shows that *sixteen head* of cattle were levied on, and forthcoming bond executed, December 23, 1867, by Hinde, Drake & Co., with Williams as security; the bond bears the same date, but the number of cattle is left blank, nor is their value specified. The certificate of the three appraisers of same date shows they appraised twenty-eight cattle, levied on under said execution, at eight hundred and forty dollars.

It may well be doubted whether this bond, being so defective, would at all authorize a judgment on motion, as a statutory obligation, whilst no doubt, as a common law obligation, it would sustain a common law action,

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or its equivalent proceeding, under the Civil Code; but if regarded as a good statutory bond, the judgment is still erroneous. By section 484, Civil Code, in chapter on summary proceedings, including various specified causes, "*and in all other cases specially authorized by statute*," it is provided, that "the motion shall be heard, and determined without written pleadings, *and judgment given according to law and the rules of equity*."

The suspension of execution sales of personal property by claimants other than the execution debtor, is provided by section 713, Civil Code; and section 716 authorizes the plaintiff to move for judgment on such bond. Under these several provisions there can be no doubt but that any equitable cause can be shown against judgment on such bond, in whole or part, in connection with the statute of February 12, 1858. Tested by the rules of equity, the plaintiff in this execution was only entitled to have one third of this property sold, because the joint and undivided interest of Hinde and Drake was not subject to be sold for Redmon's debt; and the other interest could only be sold because there is nothing in the record to show that Mrs. Redmon had either a separate estate, or had been authorized to trade as a *feme sole* under our statute of February 14, 1866 (*Myers' Supplement*, 728). Then, regarding the interest of Mrs. Redmon as inuring to the benefit of her husband, a settlement of the partnership should be made, and only his interest subjected, if there remained any interest in these cattle to him, especially since the enactment of February 12, 1858, Civil Code (*page* 202), which makes it the duty of the sheriff, when levying upon joint property to satisfy the separate debt of one of the owners, first to notify in writing the other joint owners, and then, if they fail to so notify him for fifteen days, he may pro-

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ceed to sell. In this case, however, it does not appear where Hinde, one of the partners, resided. Drake, the other, was a non-resident; but as the claimants gave their bond, all these notifications may be deemed waived, and the cause to be finally disposed of upon equitable principles. Nor does the case of *Watson vs. Gabby* (18 *B Mon.*, 660) conflict with these views, as it was decided anterior to this last enactment; and besides, section 484, Civil Code, is not referred to therein, and must have either been overlooked or since enacted; and the case of *White vs. Woodward* (8 *B. Mon.*, 484) sustains the principles of this opinion. But however this may be, we are satisfied now, that, under these various enactments and provisions of the Code, this case should be decided upon equitable principles, even when a jury is called to determine whether or not the defendant in the execution is interested in the property sought to be subjected to the sale.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

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CASE 65—PETITION ORDINARY—FEBRUARY 11.

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Bradford vs. McKibben.

APPEAL FROM BRACKEN CIRCUIT COURT.

If a dog is found roaming on a neighbor's premises without the presence of his owner or keeper, whatever and however innocent may be the temptation of the dog, his life is forfeited if the owner of the premises on which he is found exacts the penalty, and chooses to execute the sentence. (*Act of January* 31, 1865, *Myers' Supplement*, 189.)

W. C. & T. F. MARSHALL, For Appellant.

HARRISON TAYLOR, For Appellee,

CITED—

Revised Statutes, section 10, *chapter* 9, 1 *Stanton*, 223.
Myers' Supplement, p. 189.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The language of the statute is very broad, making it lawful for any person to kill, or cause to be killed, any dog which he may find roaming at large on his premises without the presence of the owner or keeper of such dog; and it shall be further lawful for any person at any time to kill, or cause to be killed, any dog which may be, or may have been, found killing, worrying, or injuring any sheep or lambs; and when any person is sued for the killing of a dog, and his defense is under this act, he shall be a competent witness to prove the same. (*Myers' Supplement, p.* 189.)

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Whatever may be the temptations, therefore, to entice a dog from home without the presence of his owner or keeper, even though it be for the propagation of his species, his innocence is no protection to him; if he is found roaming on a neighbor's premises without the presence of his protector, his life is forfeited, if the owner of the premises on which he is found will exact the penalty, and chooses to execute the sentence. As the excuse alleged for this dog's absence from home is not inserted in the statute, and made so to operate, the court has no power to give effect to it; and the court below did not err in refusing to permit appellant to prove the existence of the temptation to invite the dog to leave his home.

The instruction to the jury (and there was but one given) is in the language of the statute, and without objection.

Wherefore, the judgment must be *affirmed*.

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CASE 66—PETITION EQUITY—FEBRUARY 11.

Malchus vs. District of Highlands.

APPEAL FROM CAMPBELL CIRCUIT COURT.

The district of Highlands being authorized by legislative enactment to improve roads within said district, and to levy special taxes on the real estate by or through which such roads may pass, to pay for the grading, paying, &c. (*Act of February* 27, 1867.) Said act is held to be constitutional, and the levy of a tax on the land abutting on the roads thus improved, rated by the number of acres of each owner's tract, is sustained as approaching equality as nearly as specific taxation may be expected to approximate it; and that it cannot be adjudged as unconstitutional for invidious or unjust inequality.

E. W. HAWKINS, For Appellant,

CITED—

Sec. 4, *act incorporating the district of Highlands.*
3 *Comstock*, 401; *Powell vs. Tuttle.*

J. R. HALLAM, For Appellee,

CITED—

Session Acts, 1867, *vol.* 2, *pp.* 43–4.
13 *B. Mon.*, 29; *Slack vs. Maysville and Lexington Railroad Company.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

A legislative enactment of February 27th, 1867, incorporated a small suburban community back of Newport, Kentucky, called "The District of Highlands," and authorized its trustees "to grade and pave or macadamize with rock or gravel any public road passing through or into said district, within the limits thereof; and, with the

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assent of two thirds of the owners of the real estate by or through which any such road may pass (to) levy special taxes on such real estate to pay for such grading and paving or macadamizing."

Under that authority, a road called Mount Vernon Avenue was graded and macadamized, and a tax to pay for that improvement was imposed on the owners of land abutting it, rated by the number of acres of each owner's tract. According to that standard, the appellant's share of the burthen was two hundred and fifty-two dollars. Refusing to pay, this action was brought to enforce payment, which the court adjudged against him.

The constitutional authority delegated to this incorporated community to tax itself for its own local improvements has long been recognized by this court.

An unanimous petition authorized the improvement as afterwards made in this case, and, consequently, authorized the taxation to pay for it, unless the mode of assessment be unequal.

The charter is not, in any respect, inconsistent with the Constitution.

Although the entire road from the Alexandria turnpike to Twelve Mile turnpike, crossing the Jamestown road, is called the "Highland Avenue," yet, so much of it as lies between the turn and the Alexandria turnpike is more specifically called "Mount Vernon Avenue."

The requisite majority of the owners of land on the Mount Vernon Avenue, *including the appellant*, petitioned for the macadamization of that section of the Highland Avenue; and the like majority of land-holders on the other section also petitioned for the like improvement of that section. This was an implied authority, according to the charter, to tax the owners on each section for the cost of the improvement of his section.

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The fact that the contract for the improvements thus authorized was made for macadamizing Highland Avenue, including each section, does not affect the liability of the owners on the Mount Vernon section to the tax for the work done on that section. Nor is the completion of the other section essential to that liability. And we see no ultimate or substantial inequality in taxing by the acre, nor by the acre of each owner's entire tract. The improvement, which might not enhance the value of houses, may, and probably will, increase the value of each acre of the land of each corporator. The tax, as imposed, is not without precedents in State taxation, and seems to approach equality as nearly as specific taxation may be expected to approximate it, and cannot be adjudged unconstitutional for invidious or unjust inequality.

Wherefore, perceiving no available error in the judgment, it is affirmed.

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CASE 67—MOTION—FEBRUARY 11.

Sparks vs. Shropshire.

APPEAL FROM BOURBON CIRCUIT COURT.

1. A forthcoming bond executed by a third party, recited "*it being the property of*" *the execution defendant.* This recital is an admission that the execution defendant was the owner of the property, and as the bond suspended the sale by the sheriff and prevented a levy on any other property, the admission, without any proof of fraud or mistake, must be deemed as an estoppel against any claim or proof that such third party was the owner of the property.
2. A third party, executing a forthcoming bond for property levied on, reciting, "it being the property of" the execution defendant, cannot, without proof of fraud or mistake, assert ownership and claim to such property by executing a claimant's bond, and thereby prevent judgment against him on his forthcoming bond.

A. H. WARD, For Appellant,

CITED—

Revised Statutes, sec. 1, 1 *Stant.*, 479.
Civil Code, 713.
1 *Greenleaf's Ev., sec.* 207, *p.* 315, *note* 2.
4 *Mon.*, 370; *Hazelrig vs. Hill.*
2 *Starkie*, 30.
2 *Littell*, 209; *Camp vs. Bennett.*

J. F. ROBINSON, For Appellee.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On the 24th of November, 1864, an execution in favor of Wesley Sparks against Ansel C. Shropshire, for four

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hundred and forty-seven dollars and eighty-four cents, with interest from the 7th of April, 1869, was levied on thirty fat hogs then in the possession of the debtor. On the 25th of the same month, Frank Shropshire as principal, and John W. Carter as his surety, executed the following forthcoming bond: "We, Frank Shropshire, claiming to be principal, and John Carter, surety, bind ourselves that the property mentioned in the following schedule—thirty fat hogs—shall be forthcoming at the residence of John Carter, on the 5th day of December next, by the hour of twelve o'clock in the day, it being the property of Ansel C. Shropshire, levied on by C. S. McMillan, deputy sheriff of Harrison county, under an execution in favor of Wesley Sparks, and against said Ansel C. Shropshire, which issued from the Harrison circuit court. Witness our hands this 25th day of November, 1864.

"FRANK SHROPSHIRE,
"JOHN W. CARTER.

"Att: C. S. McMILLAN, S. H. C."

On the same day, Ansel C. Shropshire sold the same hogs to John Carter.

Three days afterwards, to-wit: on the 28th of November, 1864, Frank Shropshire, with J. M. Kembrough as his surety, executed a claimant's bond, and, consequently, the hogs were never delivered to the sheriff.

On written motion and notice for statutory judgment on the claimant's bond, a jury, on an issue involving the right of property, returned a verdict in favor of Frank Shropshire, on which the circuit court rendered judgment in bar of the motion.

On this appeal from that judgment the decisive question is, whether the recital in the forthcoming bond, of

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ownership by A. C. Shropshire, operates as an estoppel against any evidence to prove that Frank Shropshire was then the owner of the hogs.

We cannot consistently interpret the recital otherwise than as an admission that A. C. Shropshire owned the hogs; and, therefore, as the bond suspended a sale by the sheriff, and prevented a levy on any other property, the admission by deed, *without any proof of fraud or mistake*, must be deemed an estoppel, as urged by the appellant at the threshold of the trial.

The circuit court, therefore, erred in admitting testimony intended to prove that the appellee, F. Shropshire, and not A. C. Shropshire, was the owner of the hogs levied on. Without that testimony, there would have been no pretext for the verdict.

Wherefore, the judgment is reversed, and the cause remanded for a re-trial, according to the principle of this opinion.

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CASE 68—TRAVERSE—FEBRUARY 13.

Burchett vs. Blackburn.

APPEAL FROM FLOYD CIRCUIT COURT.

1. The traverse to an inquisition, on a warrant of forcible entry, before a justice, is required to be filed within three days after the inquisition. If not filed within the prescribed time, and bond for an appeal is executed, it cannot be filed in the circuit court, *nunc pro tunc*.
2. The required traverse is the only prescribed mode of appealing, and is necessary to give jurisdiction to the circuit court, to retry the truth of the inquisition held before the justice in the country. The recitals in the bond might be presumptive evidence of the filing of the traverse, in the absence of any opposing fact or testimony.
3. Unless the traverse is filed within the three days, the justice is required to enforce his judgment. A subsequent traverse would not suspend the judgment, nor give jurisdiction to the circuit court to try the truth of the inquisition.

R. T. BURNS, For Appellant,

CITED—

Civil Code, secs. 161, 513, 73.
1 *Dana*, 527; *Wayman vs. Taylor.*
4 *Dana*, 517; 4 *Dana*, 596.

JOHN HARKINS, For Appellee,

CITED—

Civil Code, sec. 509.
1 *Dana*, 528; *Wayman vs. Taylor.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The appellant, without filing a formal traverse of an inquisition against him on a warrant of forcible entry, executed a statutory bond, and took the case to the cir-

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cuit court, which, on motion by the traversee, dismissed it for want of an express traverse before the country justice. On that motion the appellant offered to file a traverse *nunc pro tunc;* and now, on this appeal, he insists that the recital in his bond of the fact of inquisition and traverse, is sufficient evidence of a legal traverse; and if not, that the court erred in rejecting his offer to file an explicit traverse.

As decided by this court in *Wayman vs. Taylor* (1 *Dana*, 528), the bond estops the traversor from denying that a traverse had been filed as required by law, and might, as against the traversee also, be presumptive evidence of such filing, in the absence of any opposing fact or testimony. But, in this case, the justice himself, and another witness, testified that no traverse had in fact been filed.

The required traverse is the only prescribed mode of appealing to the circuit court, and, like all other appeals, it must make up an express issue for retrial. The statute does not allow a traverse after three days from the date of the inquisition; and, unless it shall have been filed within that time, the justice is required to enforce his judgment. Consequently, as no traverse was filed, the judgment on the inquisition was not suspended; and a subsequent traverse could not suspend the judgment, nor give jurisdiction to try the truth of the inquisition. Had the traverse been filed in time, without a sufficient bond, the statute would have authorized the execution of the requisite bond in the circuit court; but there is no such authority for filing a traverse in the circuit court. And as the traverse is the required foundation of the circuit court's jurisdiction, and the object of the bond is only security to the traversee, there is good reason for the statutory discrimination between the necessity and the times of filing them.

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Then, the Code peremptorily requiring the traverse to be filed within three days after the inquisition, or not at all: the circuit court did not err in either of its judgments.

Wherefore, the judgment of dismission is affirmed.

CASE 69—PETITION EQUITY—FEBRUARY 13.

Rudd, &c., vs. Woolfolk, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The act of January 17, 1854 (2 *Stanton*, 534), authorizing the members of the bar to elect chancellors *pro tempore*, from time to time, for the Louisville chancery court, as emergencies may require, is constitutionally valid.
2. The reasons for electing a special judge of a circuit court or a chancellor *pro tempore* of the Louisville chancery court, and the fact of taking the required oath, shall be entered on the order book. On appeal, this order need not be copied in the record, but will be presumed to be correct; but when it is copied, and thereby no qualification appears, the presumption of correctness is rebutted.
3. Consent to the special judge or chancellor *pro tempore*, will be presumed as between the original parties to the record, before the court on actual service of process, and who are not under disabilities, but only as to them. Consent cannot be presumed against parties only constructively before the court, nor against minors or married women, nor against purchasers, who are not parties to the original record.
4. On the appeal of the purchasers of real estate sold by order of the Louisville chancery court, in a suit wherein sundry orders and the judgment of sale were made and rendered by special or *pro tem.* chancellors, the proceedings appearing to be irregular, and infants and married women and non-residents being interested parties, and

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legally unable to consent or waive any objection which they might legally urge against the election and qualification of the *pro tem.* or special chancellors or other irregularities, *the judgment of the chancellor confirming the sales and ruling the purchasers to pay, is reversed,* with directions to give either party the right, within a reasonable time, by proper pleadings and proceedings, to cure any defects in the proceedings and sales, or to show any equitable reason why the sale should not be made or confirmed.

BARNETT & EDWARDS,
GEO. WEISINGER, For Appellants,
C. P. RUDD, For Rudds,
J. F. BULLITT, For Baker & Rubel,

CITED—

Act of January 17, 1854, *secs.* 2, 3, 2 *Stanton*, 534.
Revised Statutes, article 13, *chapter* 27, 1 *Stanton*, 323.
1 *Bush*, 177; *Tomppert vs. Lithgow.*
3 *Greenleaf, sec.* 470.
2 *Dana*, 270; *Coger vs. Coger.*
2 *Met.*, 340; *Slone vs Slone.*
Constitution of Kentucky, secs. 24, 28, 40, *article* 4.
Civil Code, secs. 777, 55, 37, 56, 81, 465.
4 *B. Mon.*, 235; *Harcourt vs. Rodman.*
8 *Dana*, 43; *Claget vs. Blanchard.*
9 *Dana*, 395; *Bank of U. S. vs. Cochran.*
12 *B. Mon.*, 595; *Madeira's heirs vs. Hopkins*
2 *Bush* 135; *Jackson vs. McElroy.*
MSS. Opn., June, 1857; *Trible vs. Chilton.*
8 *B. Mon.*, 105; *Benningfield, &c., vs. Reed, &c.*
4 *Dana*, ——; *Bustard vs. Gates.*
Act of 1796, 1 *M. & B., sec.* 4, *page* 743.
Statute of 9, *Edward* 3*d*, 1 *M. & B., page* 663.
Act of 1792, *subjecting land to execution.*
Act of 1835, *creating Louisville chancery court.*
Act of 1839, *Loughborough*, 247.

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Rudd, &c., vs. Woolfolk, &c.

I. & J. CALDWELL and
BARR & GOODLOE, For Appellees,

CITED—

Act of January 17, 1854, 2 *Stanton*, 534.
2 *Duvall*, 24; *Griswold vs. Hepburn.*
Constitution of Kentucky, secs. 1, 28, 40, *art.* 4.
Constitutional Debates, pp. 1096 *to* 1121.
2 *Howard*, 343.
1 *Duvall*, 354; *Thornton vs. McGrath.*
8 *B. Mon.*, 105; *Benningfield, &c., vs. Reed, &c.*
Civil Code, sec. 37.
2 *Met.*, 340; *Slone vs. Slone.*
3 *Met.*, 137; *Vandever vs. Vandever.*
3 *Met.*, 501; *Megowan vs. Pennebaker.*
1 *Met.*, 281; *Todd vs. Dowd's heirs.*
4 *Dana*, 429; *Bustard vs. Gates.*
7 *B. Mon.*, 62; *Lampton vs. Usher's heirs.*
12 *B. Mon.*, 472; *Harrison vs. Hord.*
2 *Howard, S. C.*, 321; *Grignor's lessee vs. Astor.*
2 *Danl. Chan. Prac., p.*.1279.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellants having purchased a large and valuable real estate in Louisville, sold by order of a special chancellor elected for the purpose, because the regular chancellor could not sit, and many of the preparatory orders also being made by a special chancellor, refused to pay their sale bonds, and on a rule for them to show cause why the payments were not made, they responded, alleging a want of title because of want of power in the special chancellor to order a judicial sale, and because of other alleged errors and irregularities affecting its validity—some of the defendants who held the legal title being minors, others non-residents, and some married women.

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The want of legal power in the special chancellor is founded upon the idea that, as to the chancery court of Louisville, the Legislature could not authorize the election of a special chancellor, because not authorized by section 28, article 4, State Constitution, which is as follows: "The General Assembly shall provide by law for holding circuit courts, when, from any cause, the judge shall fail to attend, or, if in attendance, cannot properly preside."

The Legislature, by an act of January 17, 1854, 2 Stanton's Revised Statutes, 534, provides "that no suit in which the chancellor has equitable jurisdiction shall hereafter be removed from the Louisville chancery court to the Jefferson circuit court; and when, from any cause, the chancellor of said court cannot properly preside in a cause, the attorneys of said court, may, at the request of *either of the parties*, elect a chancellor *pro tempore* to try said cause."

It is insisted that the Legislature had no constitutional authority for this enactment, because not within the authority of said section 28, article 4, Constitution, and that, without such special authority, neither the Legislature nor other source can invest any one with judicial power, save by appointment in the mode designated in the Constitution, whether this be by appointment from the Executive, from the Legislature, or by the people.

From a very early period in the history of Kentucky as a State, common law, equity, and criminal jurisdiction had been invested in the circuit courts of the State, and all exercised by the same judge, and this, too, when there was no such thing as a separate chancery court in the State, as contradistinguished from the circuit court; indeed, the Louisville chancery court was the first separate court of the kind organized in the Commonwealth,

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and it was carved out of the jurisdiction of the Jefferson circuit court, to relieve it of part of its general jurisdiction, and to that extent of its vastly accumulated and increasing business. Said chancery court is recognized by section 40, article 4, State Constitution, but "subject to repeal, and its jurisdiction to enlargement and modification by the General Assembly," thus still leaving it, as originally, but a statutory court formed out of the jurisdiction of the circuit court.

The circuit courts being of general common law, equity, and criminal jurisdiction, all the statutory courts having general jurisdiction of either of these branches may be said to be carved out of it; and, therefore, substantially, and for every legal and constitutional purpose, circuit courts, whatever may be their designation by name or cognomen; hence, when the framers of the Constitution gave to the Legislature the right to provide by law for the election of special judges, or the holding of special circuit courts when the regular judge was absent or could not preside, it was doubtless meant to include all courts exercising the jurisdiction, or any part thereof, of circuit courts, by whatever designation they might be known. The object of such special provision was to relieve the litigants of the burdens and evils of protracting their litigation to await another judge, or to transfer their cause to a distant court; and as a general elective system was by this Constitution adopted, and for short terms, these evils would greatly multiply, as frequently a very prominent practitioner would be placed on the bench, leaving a large number of suits in which he could not properly preside, because of having been engaged therein as an attorney.

The same reasons and evils would apply to the Louisville chancery court, as well as other statutory courts,

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which should be, from time to time, created to relieve the accumulated business of the circuit courts.

Looking at the evils to be remedied, and the objects in view, we can hardly suppose the convention attached more importance to the name than the jurisdiction of the court; therefore, we construe the meaning of this clause of the Constitution as conferring power to provide by law for the election of special judges for any court carved out of the jurisdiction of the circuit court, because, *pro tanto*, it is a circuit court, although called by another name.

We regard said enactment authorizing the members of the bar to elect special chancellors, from time to time, for said court, as emergencies may require, as constitutionally valid.

The records show that the several special chancellors were elected, but at whose instance, or whether they were sworn, does not appear; it may, however, be presumed, at plaintiff's instance.

It is argued, with much plausibility, that, inasmuch as the orders of appointment are copied, nothing in their aid is to be presumed, as was the case in their total absence in *Slone vs. Slone* (2 *Met.*, 340), and *Vandever vs. Vandever* (3 *Met.*, 137); especially, as said act of January 17, 1854, requires the special chancellor to be elected as provided in chapter 27, article 13, 1 Stanton's Revised Statutes, 323, which provides that the reasons of the election of a special judge, and the fact of taking the required oath, shall be entered on the order-book. This order, however, need not be copied into the record, but will be presumed to be correct, as this court said in said causes; but when it is copied, and thereby no qualification of the special judge appears, the presumption of its correctness is rebutted; whilst, on the other hand, it may

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be argued that the election and qualification need not be in the same order; nor is it required that if one of the orders be copied, the other must also appear, or else its existence will not be presumed. All this reasoning on both sides may be regarded as more or less artificial; for if such orders do exist, it will always be easy to show them; and if they do not, in a direct proceeding assailing the validity of the sale by reason thereof, they cannot be shown.

But again, it is said by appellees that consent will be presumed, and that an objection to the special judge will not be heard for the first time in this court; and this may be regarded as the settled rule as between the original parties to the record, before the court on actual service of process, and who are under no disabilities, but only as to them; for consent cannot be presumed against one only constructively before the court, nor against minors nor married women, much less can it be presumed against purchasers who are not parties to the original record; nor should the motion for a confirmation of the sale made by other parties than the purchasers, be deemed a waiver, nor, even if made by them, a waiver as to any special judge other than the one then presiding.

There are other confessed irregularities in the case. This is a large and valuable real estate, within a thriving and already large city; time may add almost fabulous increased value to it; a large amount has already been paid by the purchaser, and a still larger sum remains to be paid. It cannot, therefore, be unreasonable to stay the collection of these payments for a reasonable time, to give either party opportunity, by amended pleadings and proceedings, under the inherent powers and jurisdiction of the chancellor, to perfect the proceeding, and to cor-

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rect all the irregularities; and we think it but prudent and reasonable, in view of the character of the litigants and holders of the legal title, and the character and value of the property, to do so; but should neither party do so within a reasonable time, the purchasers should be released from the present purchase.

Should the parties holding the legal title of the decedent, Craig, or his devisees interested therein, offer to show equitable reasons against the confirmation of the title, they should be heard, and their rights, as well as those of the purchasers and the plaintiffs or creditors, be also adjudicated—in a word, in these amendatory and future proceedings the equitable rights of all the parties should be heard and adjudicated, if presented within a reasonable time.

The cases of Jas. S. Peak and others, including Walton Craig and wife against Emily M. Faulkner and her husband and others, and the case of Joseph S. Woolfolk and wife against Jas. S. Peak and others, were heard together in the court below, and one judgment of sale pronounced, being the same under which Rudd and Rubel purchased.

For the reasons assigned the judgment on the rule against the purchasers, Rudd and Rubel, are reversed, with directions for further proceedings consistent herewith.

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CASE 70—PETITION ORDINARY—FEBRUARY 15.

Day vs. Cloe, &c.

APPEAL FROM HARRISON CIRCUIT COURT.

1. If the debtor is not released by the agreement of another party to pay his debt, such agreement is within the statute, and a writing is necessary; but—
2. If the debtor is released, by the agreement of another party to pay his debt, such agreement of *another party*, becomes an undertaking to pay his own debt, and is not within the statute, and it is not necessary that either the agreement or release, should be in writing.

T. N. & D. W. LINDSEY, For Appellant.

W. W. TRIMBLE, For Appellees,

CITED—

Revised Statutes, chap. 22, 1 *Stanton*, 264.
13 *B. Mon.*, 356; *Jones vs. Walker*.
3 *Met.*, 396; 15 *B. Mon.*, 446; 4 *Mon.*, 9–10.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Appellant alleges in his petition that Dagby & Parker owed him a balance for rent, and in consideration that he agreed to and did release Parker from his obligation to pay him, the appellees, the Cloes, agreed and promised to deliver to him in Colemansville eighteen barrels of corn; that they failed to deliver the corn according to their contract, and he therefore prayed judgment against them for the value of the corn, which he alleges was ninety dollars.

In their answer, the appellees deny that they, or either of them, agreed to deliver appellant eighteen barrels of

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corn at the time or place named in the petition, or any quantity of corn at any other time or place, in consideration that he would release Parker from his obligation to pay him rent, or upon any other obligation. They deny that they have any knowledge or information sufficient to form a belief whether appellant released Parker for his said obligation or not; and deny that they are under any obligation to pay the sum claimed, or any other sum.

On the issues thus made by the pleadings, the parties went to trial, and the allegations of the petition were sustained by the evidence; but the court peremptorily instructed the jury to find for appellees, and the jury found accordingly; and appellant's motion for a new trial having been overruled, he has appealed to this court.

The circuit judge was of the opinion, doubtless, that the promise as proved was within the inhibition of the statute against frauds and perjuries.

The question involved is, did the debt on Parker continue to exist after the agreement of appellees to pay it, or did it afterwards become their debt; for if the relation of creditor and debtor still existed between Day and Parker, the promise of appellees to pay it was but a promise to pay the debt of a third person, and should be in writing. But if, on the other hand, Parker was released from his obligation by Day, and appellees became his debtors, the undertaking was to pay their own debt, and no writing was necessary. Nor was it necessary that the release of Parker should be in writing to be effectual.

As there was evidence conducing to prove that Parker was released, and appellees, in consideration thereof, promised to pay the debt to appellant, the facts should have been submitted to the jury, and the peremptory

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instruction to find for appellees, was unauthorized and erroneous.

Wherefore, the judgment is reversed, and the cause remanded, with directions to award a new trial, and for further proceedings not inconsistent with this opinion.

CASE 71—PETITION ORDINARY—FEBRUARY 15.

Peters, guardian, &c., vs. Conway.

APPEAL FROM CALDWELL CIRCUIT COURT.

1. The summons shall be returnable to the next term of the court, unless that term begins within ten days from the date of the summons, when it shall be returnable to the first day of the following term. (*Civil Code, section* 70.)
2. The return day of the order of arrest, when issued at the commencement of the action, shall be the same as that of the summons. (*Civil Code, section* 183.
3. An order of attachment shall be made returnable, as an order of arrest is directed to be returned. (*Civil Code*, 225.)
4. Summons issued on the *21st day of May*, 1866, *returnable* to the first day of the *ensuing June term.* An order of attachment issued in the same action was dated *May* 21, 1866, returnable on the first day of the next term of the circuit court, and duly signed and attested by the clerk. This order of attachment was indorsed on its back, unattested, "*November term*, 1866." On the *10th day of August*, 1866, the sheriff levied this order of attachment on land. On the *25th day of August*, 1866, the owner mortgaged this same land. In a controversy between the attaching creditor and mortgagees, the court held that the *mortgagees had, but that the attacking* creditor did not have, a lien on the land.
5. It is the legal attestation, of the officer who issues, that gives validity to process, and confers legal authority on the executing officer, to serve it, therefore, in a conflict between the words of the body of the writ

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over the official signature of the issuing officer, and a mere indorsement on its back, wholly unattested, the attested words must prevail.

6. The indorsement of a levy on land on an attachment after the return day thereof, as shown upon the face of the writ, is invalid, and no lien is created on the land by such indorsement.

7. If, by mistake of the clerk, an attachment was dated May 21, 1866, when it ought to have been dated in June, 1866, and, in consequence of such mistake, the attachment, upon its face, was returnable in June, instead of November, 1866—a levy on land being indorsed on such attachment August 10, 1866—if, on motion, the mistake was shown and corrected as a clerical misprision, this would simply prove that it was legally no attachment, and no authority to the sheriff to levy it, as the return day must be tested by the date of issual, appearing on the face of the writ.

8. Subsequent attaching creditors can show defects in prior attachments, and thereby get the prior liens out of their way; and the same principle authorizes subsequent mortgagees to attack prior attachments and levies.

JOHN RODMAN, For Appellant,

CITED—

Civil Code, secs. 225, 183, 70.

P. H. DARBY, For Appellee,

CITED—

Civil Code, secs. 106, 93, 105, 225, 226, 161, 183, 91, 69.

16 *B. Mon.*, 178–80; *Nixon vs. Jack, &c.*

11 *B. Mon.*, 28; *Bourne vs. Hocker.*

16 *B. Mon.*, 83; *Brace vs. Shaw.*

18 *B. Mon.*, 623; *Lane & Bartlett vs. Robinson.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Conway having a debt upon J. P. Gracy and Wm. O'Hara, brought suit in the Caldwell circuit court, and sued out an attachment against Gracy, he being a non-resident, to Graves county, which is dated May 21, 1866, and returnable to the *next June term* of the court; at the same time a summons issued against both Gracy and O'Hara to Caldwell, returnable also at the following June term.

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The sheriff of Graves made return upon the attachment, without date, "Send a new process; we did not discover the land until it was too late."

Another attachment, *bearing the same date*, was issued, returnable "*on the first day of the next term of the Caldwell circuit court*," directed to Graves county, upon the back of which is indorsed, "*November term*, 1866," which the sheriff levied on one hundred and seventy acres of land August 10, 1866.

Gracy, having been the executor of Stephen F. Farrow, deceased, upon settlement, was found indebted to Mrs. Roberta Farrow, the widow, one thousand dollars, and to their two infant legatees, Susan and Sebe Farrow, two thousand seven hundred and forty-five dollars, and to secure which he, on August 25, 1866, acknowledged a mortgage to said Peters, as guardian for the minors, and to Mrs. Roberta Farrow, on said land, which was duly recorded. There was also a warning order on the petition of Conway against Gracy, warning him to appear and answer at the November term of the Caldwell circuit court, dated also May 21, 1866. The mortgagees and beneficiaries being made parties, they contest the validity of the attachment lien, and assert a prior lien by reason of their mortgage.

It is conceded, and the statutes of the State show, that there was a June term of said court, commencing first Monday in that month.

The court having adjudged the attachment lien good, and as prior to the mortgage, the mortgagees seek a reversal. It is here insisted by appellees that the date and return day of the attachment which was levied are erroneous, through mistake of the clerk, and that, in fact, it did not issue until after the June term of the court, as is apparent, as they insist, from the indorsement of the

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sheriff on the other attachment, and that, in fact, it was returnable to the November term of the court; and this is also attested by the words on its back, of "November term, 1866."

It may be remarked that there was no amendment to the pleadings, affidavit, or other allegation or motion, in the court below, alleging any mistake. There were ten days, in any event, between the date of the summons and attachment and the commencement of the June term.

By section 70, Civil Code, "*the summons shall be returnable to the first day of the next term of the court, unless that term begins within ten days from the date of the summons,* when it shall be returnable to the first day of the following term." By section 183, "the return day of the order of arrest, when issued at the commencement of the action, shall be the *same as that of the summons.*"

By section 225, among other things, it is provided that an order of attachment "*shall be made returnable as an order of arrest is directed to be returned.*"

It is apparent, therefore, as the summons is to be made returnable at the first term, which does not come within ten days, and as the order of arrest is to be made returnable like it, and the order of attachment the same as an order of arrest, that these provisions apply to actual and not constructive process; for, by section 91, "a defendant against whom a warning order has been made, shall be deemed to have been constructively summoned on the thirtieth day after the making the order, and the action may proceed accordingly."

There is in fact no return day specifically named for a warning order, but as it cannot be executed under thirty days, its return day cannot be under that time; hence, these provisions of the Code contained in sections

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70, 183, and 225, are inconsistent and inapplicable to a mere constructive process and service. This was a petition in ordinary, and actual process was properly sued out, and it and the attachment properly made returnable to the first following term of the court.

It is the legal attestation of the officer who issues that gives validity to the process and confers legal authority on the executing officer to serve it; therefore, in a conflict between the words in the body of the writ, over the official signature of the issuing officer, and a mere indorsement on its back, wholly unattested, the attested words must prevail, even if we could judicially determine that the legal signification of the words on the back of the writ, "*November term*, 1866," meant that the writ was then returnable; but how can a court, without allegation or proof, judicially determine what these words mean? By themselves they are meaningless; if taken in connection with the face of the writ, they are inconsistent with it; and if a mistake must be presumed, how can this court determine that the mistake was in the face of the writ, *rather than in the indorsement?* Nor can a mistake legally be presumed in the date of the attachment. From the indorsement of the sheriff on another attachment, bearing same date, how can this court judicially know but that the two orders of attachment issued at the same time, and that the sheriff, finding no indorsement on one, returned it with his indorsement; but on the other, finding the words "*November term*, 1866," on its back, executed it, especially as the one returned is indorsed by the sheriff himself, whilst the one executed is indorsed by a deputy? But suppose it was manifest that the date of the attachment should have been otherwise than it is; this would simply prove it was legally no attachment, and no authority to the sheriff to levy it,

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as the return day must be tested by the date of issual appearing on the face of the writ.

This is a contest between legal liens, unencumbered by prior equities. Neither had any equity prior to their asserted legal lien; hence, it is a question of strictly legal lien—one claiming by virtue of an attachment at law, which on its face shows it had expired, and had no legal vitality when the sheriff levied it, hence his levy could give no legal lien; the other is by a recorded mortgage subsequent to such levy.

The mortgagees have the legal title and legal lien, unless the attaching creditor can show a prior legal subsisting attachment and legal levy.

It has often been decided by this court, that subsequent attaching creditors can show defects in prior attachments, and thereby get the prior liens out of their way; and the same principle authorizes subsequent mortgagees to attack prior attachments and levies; indeed with more force, as, by the conveyance, they get the legal title; hence, necessarily have the right to attack and destroy all prior encumbrances of every kind.

This cause was finally heard and adjudicated in equity.

There are other questions raised and discussed by appellants; but as the judgment must be reversed for this error, the others need not be noticed, as appellants have no interest therein, except the one by appellees—that this mistake in the attachment is a mere clerical error, and must be corrected in the court below, and not here. This loses sight of the fact that appellants insist that there was no error as to the date of the attachment, nor as to its being properly returnable to the first following term, instead of the November term; hence, they seek no correction, but insist that, taking the writ as it really is, no valid levy was made; consequently, no legal lien attached by reason thereof.

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But even had the appellees moved, to correct and amend the process by motion in the court below, we are not prepared to decide that this would have related back to the issual of the writ, and secured the priority of the lien under the levy; for certainly the rule is different as to amending the affidavits in attachment cases, which, though sufficient to sustain the attachment as against the debtor, still, as between attaching creditors, only secures priority as of the date of the amendment; but however this may be, no such motion was made; and there is nothing in this record authorizing this court to adjudge it even a clerical misprision, even if it be conceded that such errors fall within the rules relating to clerical misprisions, which, however, need not now be decided.

It may be remarked, as the attachment levy secured no lien as to this land, it will have no jurisdiction by reason thereof to order a sale, and none on appellant's cross-petition because of the mortgage; therefore, the only question which can be judicially determined between these parties, is as to the priorities of their lien; and when it is determined, appellees have no lien by their attachment and levy. The court's jurisdiction by reason of such lien is gone, unless he shall sue out another attachment, and have it levied to sell the land subject to the mortgage lien, which may be done; and then, by reason thereof, the court will have jurisdiction to order a sale, settle and pay off the prior lien, and adjudge the surplus, if any, to Conway.

Wherefore, the judgment is reversed, with directions to adjudge the prior lien to the mortgagees, and to dismiss Conway's claim to a lien absolutely, unless he should sue out another attachment, and have it levied, and for other proceedings as herein indicated.

Judge Peters did not sit in this case.

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CASE 72—PETITION ORDINARY—FEBRUARY 15.

Voiers and Parker vs. Stout.

APPEAL FROM LEWIS CIRCUIT COURT.

1. A band of Federal soldiers arrested Stout and took him to Catlettsburg, where he was released on condition that he would execute his notes to the owners of certain horses impressed by Confederate recruits, in the taking of which he had no agency. One of these notes was assigned and collected by military duress. The judgment of the circuit court *for restitution* against the assignor and assignee of the note *is affirmed.*
2. Payment of a note extorted by military arrest being coerced by military duress, the law implied a promise to make restitution, and the assignor and assignee are jointly liable on that promise. Although they had no agency in extorting the note or coercing payment, each of them was apprised of the want of a valuable or legal consideration.

W. C. IRELAND and
GEO. M. THOMAS, For Appellants.

E. C. PHISTER, For Appellee,

CITED—

1 *Dana*, 110; *Poole vs. Adkisson.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

During the prevalence of the late civil war, a Confederate officer, enjoying for a short time the hospitality of the appellee, at his house in Lewis county, Kentucky, about that time, or shortly afterwards, recruited soldiers for the Southern army, and impressed for its service some horses.

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Upon those facts, a band of Federal soldiers arrested the appellee and took him to Catlettsburg, where he was released on condition that he would execute his notes to the owners of the horses so taken, which he did for no established consideration of value, for there is no proof of his agency, directly or indirectly, in the capture of any of the horses. One of these notes was made payable to the appellant, Voiers, who assigned it to his co-appellant, for whom it was collected under military duress.

This action was brought for the restitution of the money so extorted; and, on a full issue, the jury, under a proper instruction, returned a verdict in the appellee's favor against the appellants for the amount paid, without interest, and the court rendered judgment accordingly.

As there was no apparent consideration of value for the note, the circuit court did not err in refusing to instruct the jury that the appellants should be exonerated if the jury should believe that neither of them had any personal agency in extorting the note, or coercing payment of it. The fact alone that there was no binding consideration, deprived the note of all legal obligation; and when payment was coerced, the law implied a promise to make restitution; and the assignor and assignee are jointly liable on that promise, and especially, as the proof shows that each of them was apprised of the want of a valuable or legal consideration.

The verdict was, therefore, right; and, consequently, the judgment is affirmed.

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CASE 73—MOTION—FEBRUARY 16.

Davie vs. Long's administratrix.

APPEAL FROM FULTON COMMON PLEAS COURT.

1. On a judgment for one thousand three hundred and thirty-three dollars and thirty-three cents, with interest from December 25, 1859, less one hundred dollars paid January 14, 1860, the clerk issued an execution for the full amount and costs, making no indorsement of the one hundred dollars credit on the execution. This execution was levied upon land, which was sold in 1862, and purchased by the execution plaintiff at one thousand six hundred and sixty-six dollars and ninety cents, which about covered the amount of the execution and costs. The sheriff made a deed for the land September 13, 1865. At the March term, 1867, the execution defendant moved the court to quash the execution, levy, and sale. *The judgment of the circuit court, overruling that motion, is reversed.* The execution was not authorized by the judgment.
2. The quashal of an execution, returns, and sale of land, because a credit was not indorsed on the execution, leaves the judgment in full force, and the plaintiff may take out another execution.

BRADLEY & RODMAN, For Appellant,

CITED—

Revised Statutes, sec. 1, *art.* 6, *chap.* 36; *sec.* 9, *art.* 3, *chap.* 91.

2 *Met.*, 246–7; *Boaz vs. Nail.*

3 *Mar.*, 619; *Patterson vs. Carneal.*

7 *Dana*, 209; *Adams vs. Keiser.*

12 *B. Mon.*, 231; *Isaacs vs. Gearheart.*

7 *J. J. M.*, 625; *Carlisle vs. Carlisle.*

2 *Littell*, 121; *Gist vs. Frazier & Stewart.*

7 *Mon.*, 616; *Blight's heirs vs. Tobin.*

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GEO. C. DRANE, For Appellee,

CITED—

Revised Statutes, sec. 9, *art.* 3, *chap.* 91, *Myers' Sup.*, 214, *act of Feb.* 21, 1863.

1 *M. & B.'s Digest*, 649; 1 *Stanton*, 483.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This was a motion to quash an execution, and the levy and sale of land under it.

Appellant having executed his note to decedent, Wm. Long, for one thousand three hundred and thirty-three dollars and thirty-three cents, due December 25, 1859, upon which he paid one hundred dollars January 14, 1860, the judgment was rendered March 14, 1861, upon which, said execution was issued. This judgment applies said credit to the extinguishment of that amount of the note; consequently, the judgment, as rendered, was only for the remainder, after deducting the payment. The first execution issued on it had the payment indorsed; this was directed to the jailer, because he had served the original process, and was by him levied upon personal property, which not being sold before the return day, a *venditioni exponas* was issued, directed to the sheriff, who returned that the property had been removed from the county before this writ came to his hands. Afterwards an execution was issued to the sheriff, returnable the third Saturday in August, 1863, which the sheriff levied on three contiguous tracts of land, and sold in one body, which the plaintiff bought at one thousand six hundred and sixty-six dollars and ninety cents.

No indorsement of the one hundred dollars' credit was made on this execution, but it was issued for the full amount of the note and the costs, and the price bid just about covered it. September 13, 1865, the sheriff made

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a deed for the land, and so matters stood until this motion was made at March term, 1867, of the Fulton court of common pleas, when the court dismissed the motion and appellant seeks a reversal.

It is evident, on the statement of the facts, that the judgment did not authorize the last execution, for the judgment was not for one thousand three hundred and thirty-three dollars and thirty-three cents, with interest from December 25, 1859, but for this sum less one hundred dollars paid the decedent, Long, January 14, 1860, only a few days after the note was due. Then this is not a question whether the officer had made a part of the execution of which the plaintiff might be ignorant when his second execution issued, and which was authorized by the judgment, as was the case in *Walker and wife vs. McKnight* (15 *B. Mon.*, 477–8), but here the money was paid the decedent, indorsed on the note, and recognized by the judgment, and of which it is, legally, impossible the plaintiff should be ignorant. But in said case the officer having previously made a portion of the debt, which was overlooked by the clerk issuing the subsequent execution, and the plaintiff having purchased the land on the latter, in a suit in equity to set aside the sale the court said: "There can be no doubt that it might have been quashed by the court that had the control of the execution and the right to regulate the proceedings thereon, *if a motion for that purpose had been made in reasonable time;*" and even under the peculiar circumstances of that case, the chancellor was required to compel a *pro rata* release of the title, to the amount for which the land was sold, not then due. But in this case the plaintiff took out an execution not authorized by the judgment, had it levied, and purchases the land under it, and a motion to quash was made before it was barred by any

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known statutes. Can there be any doubt that, according to the principles recognized in the recited case and others, in and out of Kentucky, which might be referred to, the execution, levy, and sale should all be quashed? As there is a vendor's lien for this debt, the plaintiff in the execution may proceed in chancery to enforce it, or she may take out another execution on the judgment, as the quashal of the execution, returns, and sale will leave it in full force.

There are several other minor questions which need not now be determined, because not essential to this case.

Wherefore, the judgment is reversed, with directions for further proceedings consistent herewith.

CASE 74—PETITION ORDINARY—FEBRUARY 16.

Harrison vs. Slone.

APPEAL FROM PIKE CIRCUIT COURT.

The trustees of a common school district agreed to pay a teacher, or cause him to receive, the amount of money that may be due that district for 1866, in consideration of his teaching a three months' school. There being no provision in the contract exempting the trustees from personal liability, they are personally liable on their contract. The amount of this liability may be plead as a set-off by the teacher in an action against him on a note in favor of one of the trustees. (*Civil Code, secs.* 39, 128.)

JAMES A. DAWSON, For Appellant,

CITED—

Civil Code, sec. 125, *sub-sec.* 4.

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R. T. BURNS, For Appellee,

CITED—

Civil Code, secs. 128, 126; 2 *Met.*, 144.
4 *Met.*, 82, 83.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

In this action against the appellant upon his promissory note to the appellee for one hundred dollars, he filed his answer, exhibiting a contract between himself and the plaintiff and George W. Manard, as trustees of school district No. 7, in Pike county, in which, in consideration of the defendant's undertaking to teach a "three months' school" in said district, the plaintiff and said Manard agreed "to pay said Harrison (the defendant), or cause him to receive, the amount of money that may be due school district No. 7 for the year 1866;" and the defendant, alleging a performance of said agreement on his part, further averred that, according to the common school law of Kentucky, there was due to said district for said year the sum of seventy-five dollars, which neither the plaintiff nor Manard had paid to him, nor caused the same to be so paid, or any part thereof, although due and owing to him; and the said liability of the plaintiff on said contract is pleaded in the answer as a set-off against so much of the demand of the plaintiff.

To this answer the court sustained a demurrer of the plaintiff, and rendered a judgment for the amount of his claim; and from that judgment this appeal is prosecuted.

As the trustees were authorized by law to receive of the school commissioner the funds apportioned to their district, their agreement with the appellant, should, we think, be interpreted as a personal undertaking on their part to pay, or cause to be paid, to the appellant, the sum which they might be entitled to receive as aforesaid, there

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being no provision in the contract exempting the trustees from personal responsibility. And the alleged liability on this undertaking being a cause of action for a fixed sum arising upon contract, was, in our opinion, the proper subject of set-off (*Civil Code, sec.* 128); and, according to the 39th section of the Code, it was an available cause of action, and therefore a valid set-off against the appellee and his co-obligor, jointly or separately.

It seems to us, therefore, that the court erred in sustaining the demurrer to the answer.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 75—PETITION ORDINARY—FEBRUARY 17.

Dills vs. Cecil.

APPEAL FROM PIKE CIRCUIT COURT.

1. The plaintiff might sue on the appeal bond without issuing an execution on his judgment against the defendant—the plaintiff having recovered a judgment in the circuit court, on the defendant's appeal from the judgment of the quarterly court; but—
2. When the plaintiff issues an execution against the defendant, a resulting lien on defendant's property inures to his surety in the appeal bond, by subrogation. If that lien is discharged by the plaintiff, such discharge will exonerate the surety in the appeal bond, and is a good defense in a suit thereon.

APPERSON, For Appellant,

CITED—

4 *Mon.*, 492; *Morton vs. Roberts.*

4 *J. J. M.*, 366; *Field vs. O'Bryan.*

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3 *J. J. M.*, 526; *Sneed's ex'r vs. White.*
9 *Dana*, 22; *Blanford's adm'r vs. Barger.*
7 *J. J. M.*, 582; *Alexander vs. Bank of Commonwealth.*
5 *Dana*, 13; *Holbert vs. Montgomery's adm'r.*
2 *B. Mon.*, 184; *Duvall vs. Waggener, &c.*

R. T. BEVINS, For Appellee,

CITED—

Civil Code, sec. 847.
Revised Statutes, sec. 1, *art.* 3, *chap.* 63.
Act of December 20, 1865, *Myers' Sup.*, 755.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On an appeal from a judgment of the quarterly court in favor of Cecil against Thornbury, Dills signed the appeal bond as Thornbury's surety. The circuit court having afterwards rendered judgment againt Thornbury on the appeal, a *fieri facias* was issued and delivered to the sheriff of Pike county, where all the parties resided; and the execution being returned without a levy or any payment, this action was brought against Dills on the appeal bond. His answer to the petition alleged, in effect, that the sheriff could have made the amount of the execution out of Thornbury's property then liable to levy and sale, but was prevented by the fraudulent suspension of the execution by Cecil and his attorney until after the return day, whereby Thornbury was enabled to remove the property from the State, and thus deprived him (Dills) of all means of indemnity, except a successful defense to this action. The circuit court sustained a demurrer to the answer, and rendered judgment against Dills on the bond.

Although Cecil might have maintained an action on the bond without issuing any execution; yet, having chosen to issue one, a resulting lien on Thornbury's

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property inured to the surety of Dills by subrogation as Thornbury's surety; and, by thus tying the surety's hands by the execution and its lien, and then discharging that lien, as alleged, Cecil exonerated the surety. If, as admitted by the demurrer, the facts alleged in the answer be true, they constitute a good bar to the action; and the circuit court, therefore, erred in sustaining the demurrer.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings.

CASE 76—PETITION EQUITY—FEBRUARY 17.

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Dunn vs. Lancaster.

APPEAL FROM HARRISON CIRCUIT COURT.

1. The husband's right to his wife's choses in action accruing to her during coverture, is contingent and merely potential. If not reduced to possession during his life, they survive to the wife, *sua jure*.
2. The husband's assignment of his wife's choses in action is not, *per se*, a reduction of them to possession. The assignee holds, as the husband did, subject to the wife's contingent right of survivorship, or to an equitable settlement, if not reduced to possession before his death. (*Story's Equity*, *secs.* 1411, 1412; *Perdew vs. Jackson*, 1 *Russell*, 63–4; *Bruce vs. Dennison*, 6 *Ves.*, 394; *Roper on Husband and Wife*, 509 *to* 522, *addenda No.* 3; *Pierce vs. Thornly*, 2 *Sim. R.*, 167; *Ellison vs. Elwyn*, 13 *Sim.*, 309; *Horner vs. Morton*, 3 *Russell's R.*, 65; *Hord vs. Hord*, *&c.*, 5 *B. Mon.*, 84–5; *Lynn vs. Bradley*, *&c.*, 1 *Met.*, 234.)
3. By the husband's assignment of his wife's legacy, the assignee took the husband's right, and acquired no more. That right was contingent, and depended on the reduction of the legacy to possession during the

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husband's life. As the legacy, payable in five years, was not due and demandable at the time of the husband's death, there was no such reduction, nor could have been, unless the executor had anticipated the time of payment prescribed by the testator, which he rightfully refused to do.

4. The coverture of the wife protects her from the legal obligation resulting from her signature to her husband's assignment of her legacy, which was in the hands of the executor of her father. The legacy not being due or demandable, was a suspended chose in action (*Story's Equity, sec.* 1413; *Hord vs. Hord, &c.*, 5 *B. Mon.*, 85, *and cases therein cited*), subject to the contingency of reduction to possession in the husband's lifetime, and not being so reduced, it survived the wife.

JOHN S. MCCLINTOCK, For Appellant,

CITED—

2 *Story's Equity, secs.* 1402 *to* 1420.
Clancy on Rights, 144 *to* 150.
2 *Cal. R.*, 447; 2 *Hen. & Mun.*, 381.
2 *Dana*, 437; *Littell's Select Cases*, 336.
1 *B. Mon.*, 152; *Turner vs. Davis' adm'r.*
4 *B. Mon.*, 235; *Thomas vs. Kennedy.*
5 *B. M.*, 29; *Bowling & Boucher vs. Winslow's adm'r.*
5 *B. Mon.*, 81–85; *Hord vs. Hord, &c.*
13 *B. Mon.*, 295; *Lay's ex'r vs. Brown, &c.*
8 *B. Mon.*, 173; *Marshall & Co. vs. McDaniel, &c.*
14 *B. Mon.*, 160; *Tomlin vs. Joyce, &c.*
14 *B. Mon.*, 259; *Moore vs. Moore.*
1 *Metcalfe*, 232; *Lynn vs. Bradley.*

W. W. TRIMBLE, For Appellee,

CITED—

14 *B. Mon.*, 642; *Wright vs. Arnold, &c.*
8 *B. Mon.*, 543; *Davis vs. Tingle.*
1 *Story's Equity, sec.* 377.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

Thompson Conrad, who died at his home in Harrison county, Kentucky, in May, 1863, bequeathed to his daugh-

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ter, Mrs. Eliza Dunn, whose husband was then living, one thousand dollars, to be paid by his executor "in five years." Pressed by impending insolvency, the husband, anticipating a portion of that legacy to his wife, drew from the executor four hundred dollars of it in December, 1863; and afterwards, the executor refusing then to advance more of it to him, he sold and assigned the residual six hundred dollars, by two successive assignments of three hundred dollars each, to the appellee, Reuben Lancaster, and procured his wife's signature to each assignment. Shortly after the last assignment, and before the legacy was either paid or demandable, the husband died, leaving his surviving wife and three children in a helpless condition of destitution.

In February, 1868, the bereaved widow, now appellant, brought this suit in equity, claiming for herself and children the unpaid legacy, and enjoining its payment to the appellee, Lancaster; and the circuit court having dismissed her petition, she appeals to this court for relief.

The husband's right to his wife's choses in action accruing to her during coverture, was contingent and merely potential. If not reduced to possession during his life, they survived to the wife *sua jure*. His assignment of them was not, *per se*, a reduction of them to his possession.

It has long been settled, that in cases of an express assignment by the husband for the benefit of his general creditors, or of a merely legal assignment, as in bankruptcy, the assignees hold, as he did, subject to the wife's contingent right of survivorship, or to an equitable settlement, if not reduced to possession before his death. (*Sec.* 1411 *of Story's Eq. Jur., and the numerous authorities thereto subjoined.*)

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It was, for some time, doubted whether an individual assignee stands in the same category, but it now seems that he does, on the score of both principle and authority. (*Sec.* 1412, *Story's Eq. Jur.; Perdew vs. Jackson*, 1 *Russell*, 63–4; *Bruce vs. Dennison*, 6 *Ves.*, 394; *Roper on Husband and Wife, pages* 509 *to* 522, *addenda No.* 3; *Pierce vs. Thornly*, 2 *Sim. R.*, 167; *Ellison vs. Elwyn*, 13 *Sim.*, 309; *Horner vs. Morton*, 3 *Russell's R.*, 65.) And the same doctrine has been recognized by this court in *Hord vs. Hord, &c.* (5 *B. Mon.*, 84–5), and *Lynn vs. Bradley, &c.* (1 *Met.*, 234).

The case of *Wright, &c., vs. Arnold, &c.* (14 *B. Mon.*, 642), also confirms this latter doctrine. But that case discriminates between the *choses* in action of the wife, capable of immediate possession, and such as are reversionary or suspended by some limitation, and to the immediate possession of which, therefore, the wife or her husband has no title. How far that distinction is maintainable on principle and authority in all cases, we need not consider, because, however it may be applicable, that case is an authority for the wife's right as survivor in this case. In that case, however, the husband's assignee *had sold to the executor, who thereby obtained the possession, and the husband also still survived;* and beyond, or independently of those essential facts, the *dictum*, as a universal proposition, was an *obiter* suggestion, which might be consistently restricted by the authorities on different facts.

Nor is that case a sufficient authority for the assumption in this, that the apparent co-operation of the appellant with her husband in making the assignments, or obtaining, and, in some small measure, enjoying the proceeds, should operate as an estoppel against her asserted

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equity. She was evidently reluctant, and did not act with perfect freedom of will.

The legacy to the appellant in the hands of the executor was a suspended *chose* in action, and her coverture protects her from any legal obligation resulting from her signatures to the assignments to the appellee. (*Section* 1413 *of Story's Equity Jurisprudence*; *Hord vs. Hord*, *&c.*, *supra*, *p.* 85, *and the cases therein cited.*) But the legacy, when assigned, was not demandable, and therefore neither was, nor could have been, reduced to possession by the appellee, *but is still a chose in action in the hands of the executor*; and, in such a case, the authorities, without diversity, clearly show that the assignment was subject to the contingency of reduction of the legacy to possession in the husband's lifetime; and that, as it was never so reduced, it survives to the appellant: And the fact that her ostensible concurrence in the last assignment, and also not improbably in the first, was not spontaneous, but coercive, presents her claim in an unexceptionable light as to its *morale* and intrinsic justice.

The appellant, therefore, appears to be entitled to the legacy, not only as a proper settlement, but in her own right as survivor.

On the law and the facts the appellee stands where the appellant's husband would have stood had he made no assignment of the unpaid legacy; and as the husband did not reduce it to his possession, it would have survived to his surviving wife.

The assignee took the assignor's right, and acquired no more. That right was contingent, and dependent on the reduction of the legacy to possession. There was no such reduction, nor could have been, unless the executor had acticipated the time of payment prescribed by the testator, which he *rightly* refused to do.

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In procuring the assignments, the appellee risked all contingencies; and, as he cannot get the legacy, he must look for indemnity, as sought by his cross-petition, against his assignor's heirs.

Wherefore, the judgment is reversed, and the cause remanded, with instructions to render a judgment in the appellant's favor for her legacy now in the executor's hands.

CASE 77—PETITION ORDINARY—FEBRUARY 17.

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Green vs. Ball.

APPEAL FROM HENDERSON CIRCUIT COURT.

1. An erroneous judgment cannot be assailed collaterally.
2. The purchaser of land at a decretal sale agreed verbally with the defendant owner that he would become the purchaser, in order to avoid a sacrifice, and that all legal and equitable rights which he might acquire as a purchaser should operate as a mortgage to secure the repayment of whatever sums he might have to pay; and that the defendant might redeem the land by paying the sale bonds, or by refunding the amount the purchaser might pay thereon, with interest, and thus avoid the sale, or become entitled to a reconveyance of the land. The defendant paid four hundred dollars on the purchaser's bonds. The purchaser obtained an absolute conveyance, and afterwards sold and conveyed the land to a third party, who had notice of the agreement above. *Held*—That the purchaser and his vendee with notice held the title thus acquired, in trust for the defendant debtor, and that they could not evict him from the possession of the land.

   That the acts of the purchaser in obtaining the absolute title and selling and conveying the land were fraudulent; and that parol evidence was competent to prove the contract and fraud.

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That the verbal contract to make the purchase and hold the land for the benefit of the defendant debtor did not come within the statute of frauds. (*Langhorne vs. Payne*, 14 *B. Mon.*, 624; *Martin vs. Martin*, 16 *B. Mon.*, 8; *Miller's heirs vs. Antle*, 2 *Bush*, 407; *Thomas vs. McCormack*, 9 *Dana*, 108.)

CHARLES EAVES and
A. J. ANDERSON, For Appellant,

CITED—

7 *Cranch*, 241; *Conway vs. Alexander.*
1 *Howard*, 126; *Morris vs. Nixon.*
2 *Eden*, 110; *Vernon vs. Bethell.*
2 *J. J. M.*, 114; *Oldham vs. Halley.*
3 *J. J. M.*, 354; *Edrington vs. Harper.*
2 *Story's R.*, 293; *Jenkins vs. Eldridge.*
4 *Kent's Com.*, 143, *5th ed.*
2 *Sumner's R.*, 228, 232, 233.
19 *Howard*, 300; *Babcock vs. Wyman.*
2 *Atk.*, 150; *Lloyd vs. Spillote.*
1 *Wash.*, 14; *Ross vs. Newall.*
6 *Har. & Johnson*, 435; *Watkins vs. Stockett.*
4 *John. Ch'y R.*, 167; *Strong vs. Stewart.*
1 *Porter* (*Ala.*), 318; *English vs. Lane.*
1 *John. Ch'y*, 528; *Boyd vs. McLean.*
1 *Sumner*, 187; 3 *Story*, 181.
5 *Black*, 361; *Hayworth vs. Worthington.*
3 *Yerger*, 513; *Overton vs. Bigelow.*
9 *Dana*, 109; *Thomas vs. McCormack.*
2 *Sumner*, 486; *Flagg vs. Mann.*
19 *Conn.*, 29; *Bacon vs. Brown.*
22 *Ind.*, 518; *Jarvis vs. Woodruff.*
5 *Binney*, 499; *Whart. vs. Howell.*
16 *Ala.*, 432; *Russell vs. Southard.*
4 *Scld.*, 416; *Hodges vs. The Tennessee M. and T. Ins. Co.*
2 *Sumner*, 228; *Taylor vs. Luther.*
7 *Watts*, 261; *Jaques vs. Weeks.*

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STEVENSON & MYERS, For Appellee,

CITED—

4 *B. Mon.*, 336; *Watson vs. Morrison.*
2 *Dana*, 328; *Cameron vs. Bell.*
4 *B. Mon.*, 85; *McIlroy vs. Speed.*
4 *B. Mon.*, 508; *Wallace vs. Usher.*
2 *Mar.*, 602; *Watson vs. McGee.*
4 *Dana*, 430; *Bustard vs. Gates.*
4 *Dana*, 336; *Venable vs. McDonald.*
Revised Statutes, *sec.* 20, *chap.* 80, 2 *Stanton*, 230.
7 *Cranch*, 241; *Conway vs. Alexander.*
1 *Howard*, 126; *Morris vs. Nixon.*
3 *J. J. M.*, 354; *Edrington vs. Harper.*
2 *J. J. M.*, 114; *Oldham vs. Halley.*

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

W. L. Weller, as the administrator of Henry F. Cooper, deceased, brought a suit in equity against James Green, for the recovery of two thousand two hundred dollars, with interest from the first day of March, 1866, and for its payment to enforce the vendor's lien on two parcels of land which said Cooper had sold, and by one deed conveyed to Green one of said tracts, being described as containing one hundred acres, and the other as ten acres; and under a judgment in that suit the land was sold by a commissioner, and purchased by Garret Mitchell, to whom it was afterwards conveyed.

Mitchell subsequently sold and conveyed the land to W. F. Ball, who brought this suit against Green, who had remained in possession, to evict him.

The defendant presented his defense in an answer containing two paragraphs; in the first of which the regularity of the sale and conveyance of the tract of ten acres of the land was questioned, as well as the judgment of

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sale itself, on the ground that the sales of the two tracts, although they were conveyed by one deed, were separate transactions, and that no lien was reserved or existed on the tract of ten acres for the debt of two thousand two hundred dollars, which was for part of the price of the tract of one hundred acres only; and by an amended answer, subsequently filed, the defendant further alleged, that the judgment did not, in fact, direct a sale of the ten acre tract, but only subjected the other tract to sale, and that the sale and conveyance of the ten acres was unauthorized. And the defendant, in the second paragraph of his answer, and also in the amended answer, set up, as a defense to the entire action, that the purchase of Mitchell was made under and in pursuance of an express contract between him and the defendant; that Mitchell would bid for and become the purchaser of the land for the debt of Cooper's administrator, and take on himself the responsibility of paying it for the defendant, in order to avoid a sacrifice of the land; and that all legal and equitable rights which he might acquire as a purchaser, should operate as a mortgage to secure to Mitchell the repayment of whatever sums he might have to pay on his purchase; and that the defendant might redeem the land by paying the sale bonds of Mitchell, or by refunding the amount he might pay thereon, with interest, and thus avoid the sale, or become entitled to a reconveyance of the land. The answer further alleged that the defendant had paid four hundred dollars in part satisfaction of one of the sale bonds given by Mitchell in compliance with said agreement, and that he was willing to pay the balance, or submit to a sale of the land to pay it, in compliance with his contract.

The answer further alleged that the land was worth twice the sum at which Mitchell bought it, and that

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Mitchell, in violation of his agreement, had fraudulently procured an absolute deed for the land, and attempted likewise fraudulently to sell and convey the land to the plaintiff, Ball, who purchased from Mitchell, with notice of the rights of the defendant under said contract, and of the fraudulent purpose of Mitchell in making the sale.

The defendant sought to make his answer a cross-petition against Mitchell and the administrator of Cooper, and to have the cause transferred to the equity side of the court, and to be allowed to redeem the land.

The court refused to permit the additional parties to be made, or to transfer the cause to the equity docket, and sustained a demurrer of the plaintiff to the answer and amended answer, and rendered a judgment for the recovery of the land. This appeal seeks a reversal of that judgment.

On the questions separately raised respecting the validity of the sale and conveyance of the smaller tract or parcel of the land, it is deemed unnecessary to say more, than that if the judgment or final orders in the suit of *Cooper's adm'r vs. Green*, which are not copied in the transcript before us, were erroneous, they could not, according to numerous decisions of this court, be assailed collaterally in this action.

But the main question to be determined is, whether the entire answer, as amended, presented a sufficient equitable defense to the plaintiff's action for the recovery of the land. On several grounds it is insisted for the appellee that the court properly sustained the demurrer to the answer.

1. The agreement between Mitchell and the appellant not being alleged to have been in writing, it is contended that it could not be set up and enforced for the appellant's relief, because, by the first section of chapter 22

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of the Revised Statutes, the right of action is prohibited on contracts existing in parol "for the sale of real estate."

If we were required to construe the statute, unaided by any previous decision of this court, we should not be inclined to regard its provisions as applicable to this case, as the alleged parol agreement does not reasonably import a *sale* of the land by Mitchell to the appellant, but simply a contract devolving a trust on Mitchell, which the appellant might enforce in equity, if not fraudulent on his part, or within the interdiction of some law other than the statute of frauds. But that such a contract is not within the operation of the statute may be regarded as settled by repeated decisions of this court. (*Langhorne vs. Payne*, 14 *B. Mon.*, 624; *Martin vs. Martin*, 16 *B. Mon.*, 8; *Miller's heirs vs. Antle*, 2 *Bush*, 407.)

2. It is contended that the agreement with Mitchell, and his purchase under it, were fraudulent as to the creditors of the appellant; and that, consequently, equity will not interpose to relieve him. Conceding the correctness of the principle relied on, it does not appear to us that, by the facts alleged in the defense in this case, any such purpose or intent on the part of the appellant is disclosed, as to admit of the application of that principle in this case.

3. The decision of the circuit court is defended as correct, because, as is insisted, the allegations of the answer, if true, are not sufficient to change the legal import of the deed to Mitchell from that of an absolute conveyance to that of a mortgage; and especially so, as in this case the defendant seeks to avail himself of the equity asserted by him to defeat the claim of Ball, who was not a party to the agreement between the appellant and Mitchell.

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The averments of the answer in this case, which, by the demurrer, are confessed as true, leave no room for speculation as to the precise nature of the transaction between the appellant and Mitchell. Viewed in its aspect most favorable to Mitchell, it was an arrangement to vest the title in him ostensibly as an absolute purchaser, but upon an express contract that it should only operate as a mortgage to secure the repayment of so much of the purchase money as Mitchell might have to pay; and the answer not only alleges that Mitchell fraudulently violated said contract, and the trust it imposed upon him, in selling and conveying the land to Ball, but that the latter was cognizant of these facts, and therefore affected with notice of the equity of the appellant when he purchased the land from Mitchell.

Conceding the general principle that, in the absence of fraud or mistake, a deed which is, in its terms, an absolute conveyance, cannot be shown by parol evidence to have been intended as a mortgage; yet where, as in this case, an express contract is set up that the purchaser's rights should be only those of a mortgagee, and that he fraudulently violated that contract and the trust it imposed upon him, by obtaining an absolute deed to himself, and selling the land to a third person for his own benefit, the facts are, in our opinion, sufficient to take the case out of the operation of the general rule adverted to, and to authorize a court of equity to enforce the contract as originally understood and intended by the parties. (*Thomas vs. McCormack*, 9 *Dana*, 108.)

It seems to us that the court erred in refusing to permit the appellant to bring Mitchell and Cooper's administrator before the court, and in overruling the motion to transfer the case to the equity docket, and also in sus-

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taining the demurrer to the answer, and adjudging a recovery of the land.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 78—PETITION ORDINARY—FEBRUARY 18.

Kentucky Central Railroad Co. vs. Dills.

APPEAL FROM PENDLETON CIRCUIT COURT.

1. In an action against a Railroad Company, for damages, for injuries sustained by a passenger, there being *no proof of gross negligence or wanton recklessness*, the assessment ought to be compensatory or indemnifying only, and *not for smart money*.
2. If the damage resulted to the passenger solely from the negligence of the Railroad Company's agents, it is liable for compensatory damages; or,

   If it resulted solely from the negligence or temerity of the passenger himself, he is entitled to nothing; or,
3. If it was a compound result of negligence on both sides, then, as the passenger's own fault was contributory to it, he can recover nothing, unless the managing agents saw his perilous condition, and might, by ordinary diligence, have prevented the injury.

STEVENSON & MYERS, For Appellant,

CITED—

15 *Ills.*, 468; *Galena and Chicago R. R. vs. Yarwood.*

2 *Redfield on Railways*, 204, 3*d ed.*, 234–5, 61*st ed.*

23 *Penn. St. R.*, 147; *Railway Co. vs. Aspell.*

9 *Louis. Ann R.*, 441; *Dumont vs. N. O. and C. Railroad Company.*

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6 *Gray* (*Mass.*), 64; *Lucas vs. Taunton and New Bedford Railway.*
56 *Penn.*, 294; *Railroad Company vs. McClurg.*
Sedgwick on Damage, pp. 26, 27, 28, 33, 34, 3*d ed.*
2 *Duvall*, 556; *Lou. and Port. Railway vs. Smith.*
3 *Bush*, 587; *Parker vs. Jenkins.*

A. H. WARD,
LEE & MARSHALL, and
IRELAND & DUNCAN, For Appellee,

CITED—

Redfield on Railways, 2*d ed.*, *pp.* 323 *to* 330.
2 *Duvall*, 114; *Louisville and Nashville Railroad Co. vs. Collins.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

The appellee, a citizen of Pendleton county, about sixty-five years old, took passage on the appellant's train of passenger cars, from Cynthiana to Livingood station, near his residence. Before reaching the station, the speed of the train was reduced to a slow pace until the front car reached the platform, when the appellee, who was in the middle car, got out, and, standing on the lower step of the car and holding to the iron railing, he either fell or was thrown off and hurt by a cut about four inches long on the front scalp of his head, and also by sudden concussion, of which he soon recovered, without any other serious damage to his person or in loss of time.

This action was brought by the appellee to recover damages for that alleged injury, charged as resulting from the negligence of the appellant's operating agents; and the jury, on a full issue, assessed his damages at two thousand dollars, for which the court, overruling a motion for a new trial, rendered judgment.

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We may assume, from the evidence, that, while the appellee was on the step of the car, the brakesman, to force the car up to the platform of about one hundred and thirty feet length, raised the break, and thereby caused a jerk in the motion of the car; but whether that sudden motion threw the appellee off, or whether he prematurely stepped off before the car ceased to move, or whether it was there stopped at all, cannot be certainly determined from the testimony, in which there is some contrariety in respect to each of these questions. But there can be no rational doubt that, whether the train was entirely stopped or not, the conductor stepped on the platform, and a passenger got from it into one of the cars.

Nor does it appear, with judicial certainty, whether the raising of the brake was necessary or prudent, or was unskillful or negligent. It was the peculiar province of the jury to weigh the conflicting testimony, and decide on all the facts. But however the jury may have been allowed to decide them, they did not authorize a punitive verdict.

There being no proof of gross negligence or wanton recklessness, the assessment ought to be compensatory or indemnifying only. This is not a case for "*smart money.*" But, without discussing the amount of the verdict, we must reverse the judgment for error in instructing the jury.

The law applicable to the facts may be defined in the following condensed form:

1. If the damage to the appellee resulted *solely* from the negligence of the appellant's agents, it is liable for compensatory damages.

2. If it resulted solely from the negligence or temerity of the appellee himself, he is entitled to nothing.

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3. If it was a compound result of negligence on both sides, then, as the appellee's own fault was contributory to it, he can recover nothing, unless the managing agents saw his perilous condition, and *might, by ordinary diligence,* have prevented his fall.

The instructions do not sufficiently conform to this standard. After overruling instructions asked by each party the court, *sua sponte*, gave three instructions, the first and second of which are substantially correlatives; and the second being but the converse of the first, will not be quoted, as it is not complained of.

The first instruction told the jury, that if the damage resulted from the negligence or unskillfulness of the appellant's agents, "without the *fault* of the appellee," they should assess such damages as the appellee had sustained; and, by the third, the jury was instructed that it was the appellant's "duty to use such care as will *secure* the safety of passengers in their life or limb."

As the first instruction did not define "fault," as applicable to the testimony, the jury may have been misled by that instruction; and as there was no dispute about the appellee's conduct in standing on the steps of the car, the jury ought to have inferred that the court did not consider that as *his* "*fault*," for otherwise the hypothesis of "fault" was idle and misleading, and the result might indicate that the jury was actually thus misled. This instruction was, therefore, erroneous.

The third instruction was equally misleading and erroneous. It authorized the jury to infer, that whatever may have been the conduct of the appellee, it was the appellant's duty to *secure* him from harm, or, in other words, that it is the insurer of the passengers, which is certainly not the law.

Wherefore, for the errors suggested, the judgment is reversed, and the cause remanded for a new trial.

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CASE 79—PETITION ORDINARY—FEBRUARY 18.

Denton vs. Lytle, &c.

APPEAL FROM FLEMING CIRCUIT COURT.

1. Ordinarily the relative rights and responsibilities of the parties to a bill of exchange is determined by their attitude upon the bill (*Hixon vs. Reed*, 2 *Littell*, 175; *Eldridge vs. Duncan*, 1 *B. Mon.*, 101); but—
2. Although, as a general rule, even when the bill is accommodation paper, the drawer stands bound before an indorser, as between themselves —and, therefore, the indorser may look to the drawer if he pays the debt for the amount paid—the legal liabilities of the parties, arising from their relative positions on the bill, may be changed, by an agreement between them. (*Scott vs. Doneghy*, 17 *B. Mon.*, 321.)
3. The accommodation drawer and indorser each paid one half of the bill, on the basis of equal responsibilities as between themselves, as sureties of the acceptors; this fact, if unexplained, authorizes the inference, that they acted in pursuance of some previous understanding or agreement rendering it obligatory on them both to do so. In this case the indorser sued the drawer, but did not recover the amount paid by him as above.

CORD, For Appellant.

E. C. PHISTER, For Appellees,

CITED—

2 *Metcalfe*, 228; 1 *Bush*, 384.

1 *Metcalfe*, 358; *Scales vs. Ashbrook*.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

A bill of exchange for one thousand two hundred dollars, dated the 4th day of March, 1861, appearing to have been drawn by Samuel R. Lytle upon, and accepted by, Todd & Grose, and indorsed by James Denton and others, was discounted in the branch of the Bank

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of Louisville at Flemingsburg, Kentucky, as accommodation paper for the use of the acceptors, and, at its maturity, it was protested for non-payment; and, by the failure of the acceptors and other parties, said Lytle and Denton were compelled to assume and pay over nine hundred dollars of the debt. They appear to have adjusted the matter between themselves on the basis, that, notwithstanding the different positions they occupied as drawer and indorser on the bill, they were, in fact, mutually and equally the sureties of Todd & Grose.

Afterwards, in December, 1865, Denton brought this suit against Lytle and others, alleging in substance that he paid one half of said sum assumed by himself and Lytle, under a misapprehension of the relative legal rights and responsibilities of himself and Lytle as indorser and drawer of the bill, and under a mistaken belief, superinduced by the false and fraudulent representations of Lytle, that they were equally bound as sureties in the debt for Todd & Grose, and in ignorance of the fact, that, as between him and Lytle, his position was that of an indorser and surety of the latter; and on these alleged facts he sought to recover against Lytle the amount he had paid as aforesaid.

Lytle, in his defense, controverted the averment that the plaintiff, in assuming and paying part of the debt, acted under any misapprehension of the legal rights and responsibilities of the parties to said bill, or any mistake as to its legal effect whatever, and denied that he made any false or fraudulent representation to the plaintiff relative to their said rights and liabilities, or that the latter was ignorant thereof; and he resisted a recovery against him on the ground that he and the plaintiff had made their respective payments of said debt in compliance with a mutual understanding and agreement,

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that, as between themselves, they were equally the sureties of Todd & Grose.

The court, on hearing the cause, dismissed the action as to Lytle, and Denton now seeks a reversal of that judgment.

This court has repeatedly recognized the general principle, that, ordinarily, the relative rights and responsibilities of the parties to a bill of exchange are determined by their attitude upon the bill. (*Hixon vs. Reed*, 2 *Lit.*, 175; *Eldridge vs. Duncan*, 1 *B. Monroe*, 101; *Scott vs. Doneghy*, 17 *B. Mon.*, 321.)

But although, as a general rule, even where the bill is accommodation paper, the drawer stands bound before an indorser as between themselves, and, therefore, the indorser may look to the drawer, if he pay the debt, for the amount paid, the legal liabilities of the parties arising from their relative positions on the instrument may be changed by an agreement between them. (*Scott vs. Doneghy*, *supra*.)

The fact that, in this case, the parties themselves adjusted and paid the debt, on the basis of equal responsibility as between themselves as sureties, if unexplained, authorizes the inference that they acted in pursuance of some previous understanding or agreement, rendering it obligatory on them both to do so. And although the explanatory statements of the petition, if sustained by proof, would lead to a different conclusion, as these allegations of the petition are denied and not proved, it seems to us that the court rightly dismissed the action.

Wherefore, the judgment is affirmed.

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CASE 80—PETITION ORDINARY—FEBRUARY 19.

Burgess vs. The Northern Bank of Kentucky.

Burgess vs. First National Bank.

APPEALS FROM KENTON CIRCUIT COURT.

1. To a bill of exchange, accepted by one partner *in the name of the firm*, the name of the drawer and indorser was forged. This bill was sold to a bank by the partner who accepted it, and the proceeds thereof drawn by him in the firm name, by an indorsement thereof on the forged check of the drawer and indorser. Notwithstanding the forgeries, the bill having been uttered by one partner, and the proceeds thereof having been received by him *in the firm name*, each partner is liable to the bank for the amount of the bill, the officers of the bank having no knowledge of the forgeries at the time of the purchase of the bill and the payment of the money.
2. If one of the parties to a bill negotiate it with a forged indorsement, in the name of the payee, he must be understood, as affirming, that the indorsement, is in the handwriting of the payee, or written by his order, and is estopped from denying the genuineness of the indorsement, or setting up the forgery in defense of an action by the holder. (*Story on Bills, sec.* 225; *Hartsman vs. Henshaw, &c.*, 11 *Howard*, 177.)
3. Each partner is presumed to have authority to bind the firm by the use of its name upon bills and promissory notes; and when so used, the bill or note will be deemed to be on partnership account, and bind it accordingly, unless it is clearly established that the party taking it had notice that the bill or note was made for purposes not within the partnership business. (*Story on Bills, sec.* 78; *Story on Promissory Notes, sec.* 72; *Bank of Kentucky vs. Brooking, &c.*, 2 *Littell*, 42; *McGowan, &c., vs. Bank of Kentucky*, 5 *Littell*, 271.)
4. It is no answer to a claimant upon the firm, that the debt which he seeks to recover was contracted by one of the partners in the firm name, for a fraudulent or dishonest purpose, if the debt was incurred

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and the money received within the scope of the partnership business, and without the knowledge, of the other contracting party, of such fraudulent or dishonest purpose. (*Gow on Partnership*, 161.)

CARLISLE & O'HARA, For Appellant,

CITED—

Story on Notes, secs. 379, 387.

Story on Bills, sec. 451, 262, 411, 448, 451.

JOHN F. & CHAS. H. FISH, For Appellees,

CITED—

Story on Bills, secs. 78, 263, 450, 225, 262, 263, 72, 113, 211, 524.

Story on Notes, secs. 72, 379, 380, 382, 115, 341, 108, 111, 127, 225, 262, 263, 110, 46.

5 *Littell*, 271; *McGowan vs. Bank of Kentucky.*

2 *Littell*, 46; *Bank of Kentucky vs. Brooking & Clark.*

5 *Mon.*, 170; *McGrew vs. Murrell & Bullen.*

3 *Kent's Com.*, 91, 92, 93, *and note, top p.* 105.

11 *Howard*, 102; 18 *Curtis*, 591.

3 *Hill*, 227, 228; 5 *Mon.*, 384; 7 *Mon.*, 457.

Chitty on Bills, pp. 261, 636, 262, 638, *and notes.*

3 *Barr*, 1384; *Price vs. Neal;* 1 *Bla.*, 390.

2 *Crampton & Jarvis*, 425.

Parsons on Partnerships, pp. 199 *to* 214.

Byles on Bills, p. 32.

2 *Parsons on Notes and Bills, pp.* 589 *to* 594.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

The appellees, the president, directors, and company of the Northern Bank of Kentucky, brought this action against J. H. Jurey and Joseph Burgess, late partners in business, in the firm name of Jurey & Burgess, and Edward Burgess, on a bill of exchange, purporting to have been drawn by said Edward Burgess upon, and

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accepted by, said Jurey & Burgess, for three thousand dollars, dated the 28th day of June, 1867, payable to the drawer's own order, at the Bank of the Ohio Valley, Cincinnati, Ohio, ninety days thereafter, and indorsed in his name, and which appears to have been sold to the plaintiffs by Jurey, acting in the partnership name of Jurey & Burgess; and the proceeds of the bill were paid to him on a check therefor, purporting to have been drawn by said Edward Burgess, in favor of said Jurey & Burgess, which he indorsed to the bank in said partnership name.

Edward Burgess not having been brought before the court, the action was discontinued as to him.

Without controverting the existence of the partnership, or the authority of Jurey to use the name of the firm of Jurey & Burgess, within the scope of their partnership business, Joseph Burgess, by his separate answer, denied that the bill had been transferred to the plaintiffs by Edward Burgess, by his indorsement or otherwise, and alleged that the name of Edward Burgess, purporting to be his signature as indorser of the bill, was a forgery, and that it had been so made without his knowledge, consent, or connivance, and that the plaintiffs having received the bill upon said forged indorsement, they were not the owners thereof, and had acquired no right of action thereon.

The law and facts of the case were, by consent, submitted to the court for trial without the intervention of a jury, and the court rendered a judgment for the debt against Joseph Burgess, and from that judgment he prosecutes this appeal.

It was sufficiently proved on the trial that the name of Edward Burgess upon the bill, both as drawer and indorser, as well as his name affixed to the check, on the

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indorsement of which Jurey drew the money, was not the genuine signature of Edward Burgess, but a forgery. But there was no evidence before the court conducing to prove that the officers of the bank had knowledge that said instruments were not the acts of Edward Burgess; nor does it appear that they had any notice that Jurey, in obtaining the money upon them in the firm name of Jurey & Burgess, was not acting as one of the firm in the course of its legitimate business.

Upon these facts it is contended for the appellant that the bank acquired no title to the bill, and, moreover, if the negotiation of it was such as to transfer it, the plaintiffs were, nevertheless, not entitled to recover, because the proceeds of the bill were not paid to Edward Burgess or to his order, but were paid on the presentation of a forged check purporting to have been drawn by him.

In Story on Bills, section 451, the general principle is stated, that "if the indorsement under which the holder claims is forged, the acceptor is not bound to pay the bill; and if he does, the real owner is still entitled to recover the amount, as well from the holder as from the acceptor." This we regard as a correct principle of law, as applicable to cases in which the parties sought to be charged are not estopped by their own acts or connection with the negotiation of the bill from controverting the indorsement or the validity of the title of the holders. But in this case the attitude of the appellant is materially different from that which he would have occupied, if the bill had been put in circulation by means of a forged indorsement by a stranger, or one for whose acts he was under no legal responsibility.

If one of the parties to a bill negotiate it with a forged indorsement, in the name of the payee, he must

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be understood as affirming that the indorsement is in the handwriting of the payee, or written by his order, and is estopped from denying the genuineness of the indorsement, or setting up the forgery in defense of an action by the holder. (*Story on Bills, sec.* 225; *Hartsman vs. Henshaw, &c.*, 11 *Howard*, 177.)

If these views be correct, Jurey, who negotiated the bill in the partnership name of Jurey & Burgess, could not escape responsibility on the ground that the indorsement of the bill was a forgery. Is not the appellant equally liable to the holders, although innocent of any participation in the crime of forgery imputed to his partner?

It is a general principle in the law of partnerships, and one which this court has long and uniformly recognized, that each partner is presumed to have authority to bind the firm, by the use of its name, upon bills and promissory notes; and when so used, the bill or note will be deemed to be on partnership account, and bind it accordingly, unless it is clearly established that the party taking it had notice that the bill or note was made for purposes not within the partnership business. (*Story on Bills, sec.* 78; *Story on Promissory Notes, sec.* 72; *Bank of Kentucky vs. Brooking, &c.*, 2 *Littell*, 42; *McGowan, &c., vs. The Bank of Kentucky*, 5 *Littell*, 271.)

It is insisted, however, that although the transaction between Jurey and the bank was such as would ordinarily bind the firm of Jurey & Burgess, yet, as Jurey appears to have been guilty of a crime in uttering the paper upon a forged indorsement, the illegality of the transaction on the part of Burgess renders the case an exception to the general rule, by which one partner is held to responsibility for the acts of another. But we deem this distinction rightly taken only so far as accountability for the criminal offense is concerned; not so as to the legal conse-

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quences of the acts of a partner as affecting the rights of others, which are presumed to be done in the course of the partnership business; for it is no answer to a claimant upon the firm that the debt which he seeks to recover was contracted by one of the partners in the firm name, for a fraudulent or dishonest purpose, if the debt was incurred and the money received within the scope of the partnership business, and without the knowledge of the other contracting party of such fraudulent or dishonest purpose. (*Gow on Partnership*, 161.)

As to the objection that the money was wrongfully withdrawn from the bank by Jurey, on a forged check, drawn in the name of Edward Burgess, it results, from what we have already said, that as Jurey indorsed that check in the firm name of Jurey & Burgess when he negotiated the bill, the appellant was precluded from setting up the forgery to show that the bank had not properly paid the consideration for which the bill was passed to it.

Wherefore, the judgment is affirmed.

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CASE 81—RULE—FEBRUARY 19.

Gay vs. Morgan, &c.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

SUMMARY PROCEEDINGS.—In an action in the nature of replevin, to recover a horse, the defendant executed bond, with surety, and retained possession of the horse. Plaintiff recovered judgment for the horse, or his ascertained value, and, at the same term, moved the court for a rule against the surety to show cause why judgment should not also be rendered against him. On the trial of the rule, the circuit court properly refused to render judgment against the surety. Such a summary proceeding is not authorized by statute, nor is it embraced in sections 283, 479, or 484 of the Civil Code. *On such a bond, the plaintiff must proceed against the surety by an action thereon.*

J. Q. A. KING, For Appellant,

CITED—

Civil Code, secs. 215, 283.

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Gay brought his suit in the nature of replevin to recover a horse of Kornegay, who gave bond, and retained the possession of the horse.

The plaintiff having recovered a verdict and judgment for the horse or the ascertained value, moved for a rule, at the same term of the court, against the security, Morgan, to show cause why judgment should not also be rendered against him; and, on the trial of the rule or motion, offered to file the affidavit of his counsel that, after the recovery, and before asking for the rule, he, for the plaintiff, had demanded the horse or his assessed value of both the principal and security, and both had

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refused; which affidavit the court rejected, and dismissed the rule, and Gay seeks a reversal.

By section 2, Civil Code, "Remedies in Civil Cases," are divided into—1. "Actions;" 2. "Special Proceedings."

In *Watson vs. Gabby* (18 *B. Mon.*, 662), this court, upon a motion and judgment on a claimant's bond, executed to the officer after levy of the execution in his hands, held, that "the proceeding cannot be considered an '*action*,' as defined by the Civil Code, but comes more properly within that class of remedies denominated *special* or *summary proceedings*," and authorized by section 484.

The Civil (Code *sec.* 479), regulating *summary proceedings*, provides, that "judgments and final orders may be obtained, on *motion*, by sureties against their principals; sureties against their co-sureties for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables, and other officers, for the recovery of money or property collected for them, and damages; and *all other cases specially authorized by statute*."

It is evident that this motion is not authorized by this section, unless there be some statute specially authorizing it.

Section 283 only authorizes summary proceedings on bonds to obtain discharge of specific attachments, or for forthcoming of steamboats or *other property specifically attached*.

Section 3, "Preliminary Provisions," of Civil Code, defines a civil action to be "an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong."

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And section 4 defines special proceedings to be "every other remedy in a civil case."

Among the many special provisions of the Code and statutes authorizing summary proceedings on bonds executed in legal proceedings, we have found none embracing the bonds authorized and required in an ordinary action in the nature of replevin.

In the absence of any special authority for a summary remedy, the party must be remitted to his civil action for the enforcement and protection of his private rights. The court, therefore, properly rejected the affidavit and dismissed the rule.

Wherefore, the judgment is affirmed.

CASE 82—PETITION EQUITY—FEBRUARY 23.

Goins vs. Allen, Morton & Co.

APPEAL FROM GRAVES CIRCUIT COURT.

1. Whilst the vendee, with a bond for conveyance of land, was in possession, his vendor made a deed to other parties for the same land. The holder of the bond has a superior equitable title, and the holders of the deed and legal title may be compelled to surrender and convey the same to him.
2. Possession of land under a contract of purchase, is constructive notice of claim to the land.
3. A recital in a deed of the consideration paid for land may be evidence between the parties to the deed, but it is no evidence of the fact between the grantees and third parties, and strangers to the transaction.

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ANDERSON, For Appellant.

L. D. HUSBANDS, For Appellees.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

It is very clearly established by the evidence that in August, 1861, Elijah Sullivan, then being in possession of the land in controversy, contracted to sell it to appellant for a valuable consideration; and in September or October of that year put him in possession of it, and he was so possessed on the 13th day of June, 1862, the date of the deed from Sullivan to appellees for the same land.

If appellees had contracted with Sullivan for the land prior to the date of said deed, it is not shown in this record that appellant had any notice of it whatever, either constructive or actual. They do not show that they had ever been in possession of the land.

But even if the foregoing obstacle could be removed, there appears to be another insuperable difficulty in their way. They failed, by sufficient evidence, to show that they had, in fact, contracted for the purchase of the land in 1860. The witness who wrote their deed only proves a paper, purporting to be a bond for a title from Sullivan to appellees, was produced by them when he wrote the deed. He does not prove the date of that paper, or that it ever had a date; nor does he prove it was executed by Sullivan, or that appellees ever paid one cent for the land, or were bound to pay any thing for it; so that if it had been shown to have, in fact, been executed by Sullivan prior to appellant's bond, there is no proof of a consideration to uphold it.

The deed, without a previous contract for the land upon a valuable consideration, will not avail appellees,

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because at its date appellant was in possession of the land under his contract of purchase, which was constructive notice of his claim to the land. Moreover, the recitals in their deed of the consideration paid for the land might be evidence of the fact between the parties to the instrument, but is no evidence of the fact between the grantees and third parties, and strangers to the transaction. (*Edwards vs. Ballard*, 14 *B. M.*, 289.)

It is apparent, therefore, that appellees wholly failed to show a superior equitable title to the land, and having procured the legal title after appellant had acquired, by his contract, a superior equity, the court below should have required appellees to surrender the legal title, and should have dismissed their cross-petition and proceeded to confirm and perfect the sale under the judgment of foreclosure of Carter's mortgage.

Wherefore, the judgment is reversed, and the cause is remanded for further proceedings consistent herewith.

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CASE 83—PETITION EQUITY—FEBRUARY 23.

McMillan's heirs vs. Hutcheson, &c.

APPEAL FROM HARRISON CIRCUIT COURT.

1. Every survey made and patent issued, under the act of 1835, on county court certificates, for vacant and unappropriated land, which interferes with any survey or patent theretofore made or issued, is null and void.
2. As a patent is a species of record, it is a general rule, that, when it appears void on its face, it can only be avoided by a direct proceeding in the nature of a *scire facias;* but
3. When patents are declared void by statute, the legal nullity of the patent, may be shown collaterally, by extraneous proof of the fact that annulled it. (*Ray vs. Barker's heirs*, 1 *B. Mon.*, 368; *Dallam vs. Handley*, 2 *Marshall*, 418; *Atchly vs. Latham*, 2 *Littell*, 362; *Jennings vs. Whitaker*, 4 *Mon.*, 51; *Pearson vs. Barker & Asbell*, 4 *Dana*, 322; *Cone vs. Flynn*, *Ib.*, 501; *Taylor vs. Fletcher*, 7 *B. Mon.*, 82; *Clark vs. Jones*, 16 *B. Mon.*, 126.) *Such patents are no documentary title.*
4. A survey and patent made and issued in 1849, under the act of 1835, for land which had been in adverse possession for more than thirty years, and which had been surveyed under a Virginia warrant in 1784, was utterly and absolutely null and void, and the holders of either the possessory right, or the title under the survey of 1784, was entitled to recover the land as against the holder under the void patent of 1849.
5. A party in possession, under a patent which is declared to be void by the statute of 1835, under which it issued, stands just as he would, had he never procured a survey or patent; and as he has no title derived from the Commonwealth, the limitation of seven years for the protection of actual settlers under any such title does not apply to his settlement, under his void patent, which conferred no right or title; and in such a case, the void patent being no documentary title, twenty years adverse and continued possession would not evict beyond his actual inclosure.

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6. Land surveyed in 1784 was sold and conveyed in 1794. Patent issued in 1850. The patent passed the legal title to the vendees, by relation.
7. Seisin, in its technical sense, is actual or constructive possession under a perfect legal title—it includes, as an essential element, an actual entry also.
8. "Seized," as used in a power of attorney given in 1794 by a non-resident to sell lands of which he was *then seized in Kentucky*, is construed to have meant, possessed, or entitled to, in law or equity, and to have included land surveyed, but not patented. It did not appear that the maker of the power held any land in Kentucky under a patent at that time.
9. An agent's conveyance is not voidable, because he conveyed land of his principal by a less extensive warranty than the power might have authorized.

A. H. WARD and
W. W. TRIMBLE, For Appellants,

CITED—

Act of 1798, *M. & B.'s Digest*, 779.
2 *Bibb*, 64; *Greene vs. Liter, &c.*
2 *Bibb*, 65; *Speed vs. Buford.*
Act of 1835, *Loughborough's Digest*, 386.
16 *B. Mon.*, 127; *Clarke vs. Jones.*
1 *Dana*, 326; *Simpson vs. Hawkins.*
1 *Wash.*, 42; *Temple vs. Logwood.*
4 *McChord.*, 267; *Reph vs. Gist.*
5 *Binney*, 238; *Alexander vs. Jamison.*
3 *Gill & Johnson*, 234; *Thrasher vs. Everhart.*
1 *Munford*, 487.
1 *Greenleaf's Ev.*, *sec.* 296, *note* 6, 144.
Act of Dec. 19, 1796; 1 *Littell*, 489, *sec.* 40.
1 *M. & B.*, 319 *to* 326, *a.*
1 *Starkie*, 343–5, *and notes.*
4 *Dana*, 424; 6 *Dana*, 110.

G. DAVIS, For Appellees,

CITED—

Paley on Agency, 150.
Coke, Litt., 49*b*, 303*b*, 258*b*.

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1 *Mar.*, 200; 4 *Bibb*, 554.
2 *Duvall*, 14; *Jones vs. Macaulay's heirs.*
9 *B. Mon.*, 82; *Thomas vs. Campbell.*
6 *Mon.*, 577; *Dehart, &c., vs. Wilson.*
4 *Mon.*, 41; *McMurtry, &c., vs. Frank.*
2 *Bibb*, 175; *Plummer vs. Logan.*
1 *Mar.*, 278; *Spurr vs. Trimble.*
4 *Mon.*, 433; *Logan vs. Steel's heirs.*
5 *Mon.*, 188; *Jackson vs. Murray.*
2 *J. J. M.*, 437; *Fitzhugh vs. Croghn.*
2 *Bibb*, 412; *Innis vs. Crawford.*
3 *Bibb*, 57; *Speed vs. Buford.*
5 *J. J. M.*, 336; *McClain vs. Todd's heirs.*
10 *B. Mon.*, 50; *Neely vs. Butler.*
Story on Agency, 429.
6 *Mon.*, 82; *Morrison's ex'r vs. Taylor.*
4 *Mar.*, 406; *McConnell vs. Bowdrys.*
2 *Mar.*, 245; *Bruce vs. Desha.*
4 *Dana*, 465; *Sowder vs. McMillin's heirs.*
5 *Littell*, 316; *Fowke vs. Darnall.*
Adams on Ejectment, 29.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

On the 18th of July, 1859, the appellant, Worthen, sued the appellee, Wm. Hutcheson, and Thomas McClure, his tenant, for about five hundred and sixty-five acres of land, occupied by them under a Kentucky patent issued to Hutcheson May 22d, 1849, on county court certificates, under the statute of 1835, authorizing such appropriations of *vacant* lands for the benefit of the counties respectively including them.

Worthen claimed in severalty, under his ancestor, Samuel McMillan, deceased, and his original action was by petition ordinary; but apprehending that his several title

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had not been perfected, he made all the heirs of Samuel McMillan co-plaintiffs, and thereon the suit was transferred to the equity docket, and was prosecuted in equity until it was, years afterwards, dismissed by the judgment of the circuit court, as not maintainable in that forum.

The appellants, heirs of Samuel McMillan, claim two thousand acres (including the land in controversy), under a patent issued to Josiah Watson, January, 1850, on a recorded survey of four thousand acres made March 17th, 1784, on Virginia treasury warrants; a sale and conveyance of two thousand acres thereof by said Watson, made November 22d, 1794, through John Taylor, as his agent, acting under a written power of attorney, and continuous adverse possession for more than thirty years before the appellee, Hutcheson, entered thereon.

Hutcheson denied that the title of the appellants was more than an unavailable equity, and insisted that Taylor's sale and conveyance were not authorized by Watson, and that, even if it was, it passed only an equity, which never matured into a legal title in the *appellants*. He cannot, therefore, now object to the jurisdiction of a court of equity, and especially as this case was consolidated with a suit in equity for the consummation of a partition among the appellants, and as such long and elaborate preparation was made by both parties after the translation to the equity docket of the court; and it was certainly too late to dismiss the case for want of equity jurisdiction. We must, therefore, inquire whether the appellants established a right to recover the possession from the appellees.

To relieve the case of some confusion, we will first consider the title, and define the legal attitude of the appellee, Hutcheson, the extent and effect of whose oc-

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cupancy depend on the character of his documentary title.

The law under which Hutcheson made his survey and obtained his patent only authorized the appropriation of "*vacant* land," and, in that respect, was like the act of 1815; and, consequently, an appropriation under either of those laws of land either occupied or previously appropriated by the patent or survey of another, was alike illegal. But, in another and radical particular, these statutes differ—that of 1815 declaring only that the title of the intruder should be "*inferior*" to that of such preoccupant or appropriator; and that of 1835 declaring it "*void*" by the following provision: "That no location or appropriation of land whatever under this act shall prevail against any actual settler, including to his boundary, whether the actual settler has any title in law or equity from the Commonwealth or not, provided he has a deed or bond for the land; and every survey and patent which interferes with the settlement or boundary of any actual settler shall be *void;* and *any survey or patent made or issued under this act, which interferes with any survey or patent heretofore made or issued, shall be null and void.*"

There being no legal authority under either of these enactments to survey or grant land already appropriated, and, therefore, *not* "*vacant*," the illegal appropriation is intrinsically invalid. The act of 1815, however, virtually declared that it should not be *void*, but only inferior; but the act of 1835, declaring it void, used language which could not be misinterpreted by those who often use and construe void as synonymous with voidable; and, to leave no subterfuge for such misinterpretation, and show that the word void was used in its technical and true philological sense of *nullity*, it prefixed "*null*," and said "*null and void.*"

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As a patent is a species of record, it is a general rule, that, when it does appear void on its face, it can only be avoided by a direct proceeding in the nature of a *scire facias*. But reason, as well as Kentucky judicial authority, excepts from this rule patents declared void by statute; and, consequently, it has been consistently settled by the judiciary of Kentucky, that, in all such cases, the legal nullity of the patent may be shown collaterally by extraneous proof of the fact that annulled it.

In *Ray vs. Barker's heirs* (1 *B. Mon.*, 368), this court said: "The doctrine has become too firmly fixed, by the repeated adjudications of this court, now to be shaken, that when the Legislature has, by statute, declared a patent *void*, which issues contrary to its enactment, the facts necessary to show that it issued contrary to the statute, and is, therefore, void, may be established by parol and other proof *dehors* the patent, and, when established, will defeat a recovery upon it." And the following citations are appended: *Dallam vs. Handley*, 2*d Mar.*, 418; *Atchley vs. Latham*, 2 *Littell*, 362; *Jennings vs. Whitaker*, 4 *Mon.*, 51; *Pearson vs. Baker & Asbell*, 4 *Dana*, 322; *and Cane vs. Flynn*, *Ib.*, 501.

As confirmatory authorities we subjoin *Taylor vs. Fletcher*, 7 *B. Mon.*, 82, *and Clark vs. Jones*, 16*th Ib.*, 126, and might cite other decisions in which the same doctrine has been incidentally recognized.

Consequently, it appearing in this case that the land surveyed and patented to Hutcheson was then occupied under Watson's survey, Hutcheson has no documentary title, his survey and patent being utterly and absolutely "null and void." He stands, therefore, in this contest, just as he would had he never procured a survey or patent; and as he has had *no title* derived from the Commonwealth, the limitation of seven years for the

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protection of actual settlers under any such title does not apply to his settlement under his void patent, which conferred no right or title, and placed him in no better or more meritorious condition than a settler without any documentary claim; for when he made his location he knew that he was intruding on the possession of McMillan and the survey of Watson.

He has not established any adverse and continued possession for twenty years; and if he had, as it was without title, it could not have evicted McMillan's antecedent and continued possession beyond his actual inclosure, which is neither defined as existing twenty years nor shown to have been so long.

McMillan's actual possession, constructively coextensive with his claim for more than thirty years, is abundantly established; and this alone proves a right of entry in the appellants. But their possessory is not their only title. Watson's patent conferred the only legal title, and they hold under that patent which passed the legal title to them by relation, if Watson's conveyance was valid and binding, and transferred to their ancestor his equitable right; and that it was valid and passed his equity, we cannot doubt.

The agent did not transcend his authority to sell and convey by general warranty the constituent's lands, of which he was "seized" in Kentucky. Seisin, in its technical sense, is actual or constructive possession under a perfect legal title; and, according to the decision of this court in *Speed vs. Buford*, it includes, as an essential element, an actual entry also. Watson being a non-resident, and not shown to have been in Kentucky, or to have been even the patentee of any land here as early as 1794, when he gave the power of attorney, it would seem absurd to assume that he meant by the word "seized" more than

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possessed or entitled to in law or in equity; and we must presume that he used the term in that, its popular import; nor was the agent's conveyance voidable by Watson for binding him by a less extensive warranty than the power might have authorized.

Moreover, these objections by appellee's counsel *are effectually answered by unquestioning acquiescence for seventy years.*

From the foregoing, which we consider the only maintainable conclusions from the law and the facts of this case, the inevitable result is, that, either on the possessory or the documentary title, and more especially on both united, the appellees, as heirs of Samuel McMillan, deceased, are entitled to recover all the land involved in this litigation, to be allotted among them according to their respective rights as between themselves.

Wherefore, the judgment is reversed, and the cause remanded for a judgment of eviction conformable with this opinion.

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CASE 84—PETITION ORDINARY—FEBRUARY 24.

Baker vs. Louisville and Nashville Railroad Company.

APPEAL FROM WARREN CIRCUIT COURT.

1. A plea to the jurisdiction of the circuit court, after a defense to the merits of the action, unless for want of jurisdiction over the subject-matter of the action, comes too late.
2. A defense to the merits of an action amounts to a waiver of the objection to the jurisdiction over the person of the defendant.
3. In an action on contract in the Warren circuit court, against the Louisville and Nashville Railroad Company, objection to the jurisdiction, because it did not have its principal office or place of business in that county, and that its chief officer did not reside therein, is waived, by answer to the merits of the action.
4. When the residence of the chief officer of a corporation, created by the laws of this State, and its principal office and place of business are not in the county in which a transitory action is brought against such corporation, unless these facts appear in the petition, objection to the jurisdiction of the court over the person of the defendant cannot be made by demurrer. *Such objection must be made by plea; but after answer to merits of the action, such plea, cannot be maintained.*
5. The court cannot judicially know that the residence of the chief officer of a corporation, or its principal office or place of business, is not in the county in which an action is brought against such corporation. (*Civil Code, sec.* 101.)

GRIDER, For Appellant.

[Brief not in record.]

J. R. UNDERWOOD, For Appellee,

CITED—

Civil Code, secs. 93, 100, 102, 123.

2 *Bush*, 575.

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JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Appellant brought this action in the Warren circuit court on the 5th of July, 1865, against appellee, for the price of a quantity of wood sold by him to it.

In a few days after the institution of the action, the summons was served on the agent of appellee in Warren county; and, at the succeeding term of said court, James Guthrie, as appellee's president, appeared and filed his answer to the merits of the action, neither calling in question nor contesting the jurisdiction of the court.

The cause was continued on the docket until the February term, 1867, of said court, when there was a trial upon the merits, and a verdict rendered in favor of the plaintiff for two thousand dollars. On grounds filed, and a motion thereof, a new trial was awarded appellee.

A year thereafter, at the February term, 1868, of said court, appellee filed an amended answer to the merits of the action, and a jury was sworn, and heard the evidence; but, failing to agree, was discharged, and the cause continued.

At the August term, 1868, appellee filed a demurrer to the petition, the ground of which, as stated in the demurrer, is, that, "it appears from the petition that the court has not jurisdiction of the said case."

The demurrer was sustained by the court below; and appellant, having declined to plead further, his petition was dismissed, and he appealed.

It is insisted for appellee, that as appellant's action, being based on a contract for an alleged sale of wood to it, that the Warren circuit court had no jurisdiction of the case, but that the action should have been brought in such court of Jefferson county as had jurisdiction over the subject-matter of the action; and sections 93, 101,

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and 102 of Civil Code, are relied upon as sustaining that position.

Section 101, *supra*, is as follows: "An action, other than those mentioned in sections 93 and 94, against a corporation created by the laws of this State, may be brought in the county in which it is situated, or has its principal office or place of business, or in which its chief officer resides; but if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency.

The other two sections referred to need not be quoted, as they direct where actions arising for the causes as therein enumerated may be brought, which enumeration does not embrace the cause of action set out in this petition, and are referred to by the counsel of appellee to show that it is not embraced in either of said *sections*.

In argument it is said that the petition "does not show any fact by way of averment to give the Warren circuit court" jurisdiction, and this court will take judicial notice of the fact that the chief officer of appellee resides in Jefferson county, and its principal office is kept in said county; and in support of this proposition the case of *Commonwealth vs. Palmer* (2 *Bush*, 570) is cited and relied on as authority.

The facts stated in the petition show very conclusively that the Warren circuit court had jurisdiction of the subject-matter of the action. There is no averment in the petition that the jurisdiction is local; but, on the contrary, the facts alleged show that it is transitory, and if the Warren circuit court had not jurisdiction of the person of appellee (for it is a person in law, though artificial), it is because that jurisdiction is denied to

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appellant by section 101, Civil Code, *supra*. But if that be so, two preliminary questions are presented: 1st. Can the want of jurisdiction in that court be taken advantage of by demurrer? and, 2d. If it could have been, was it not waived by pleading to the merits?

By section 120, Civil Code, the grounds of demurrer are enumerated, and are as follows: The defendant may demur to the petition, where it appears on its face, either—1st. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or, 2d. That the plaintiff has no capacity to sue; or, 3d. That there is another action pending between the same parties for the same cause; or, 4th. That there is a defect of parties plaintiff or defendant; or, 5th. That the petition does not state facts sufficient to constitute a cause of action.

Section 123 provides, that when any of the matters enumerated in section 120 do not appear upon the *face of the petition*, the objection may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, and the objection that the petition does not state facts sufficient to constitute a cause of action.

It certainly does not appear on the face of the petition in this case who was the president or chief officer of appellee, nor where he resided, nor where its principal office or place of business is situated; but the distinguished counsel says the court must take judicial notice of these facts, and, therefore, they need not appear on the *face of* the petition for the purpose of the demurrer.

In this opinion we cannot concur with counsel, for several reasons: first, to do so, we must disregard an

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express provision of the Civil Code, the direct and expressed legislative will on the subject; and, in the next place, the omitted facts from the face of the petition cannot be such as this court could take judicial cognizance of. They have not the slightest analogy to the facts referred to in the case of the *Commonwealth vs. Palmer*, *supra*.

It would be carrying the doctrine far indeed—too far—to say, that, because this court must have judicial knowledge that, during a rebellion, a *military commander* in this *State* was inciting a spirit of servile insurrection amongst the slaves, encouraging them to escape from servitude, under assurance of military protection, and requiring owners, officers, and agents of railroads, steamboats, and public conveyances of all sorts, to transport them from place to place, under peril of confinement in the penitentiary—all of which he could enforce by military power—links in the chain of events which severed the relation of master and slave in the State, changed one of the institutions of the country, and the destiny of a race of people: the court must judicially know who are the chief officers of corporations in the State, their respective residences, and where their principal offices or places of doing business are located.

But a plea to the jurisdiction, after a defense to the merits of the action, unless for want of jurisdiction over the subject-matter of the action, comes too late. A defense to the merits amounts to a waiver of the objection to the jurisdiction over the person of defendant; and this is the common law doctrine on the subject.

Wherefore, the judgment is reversed, and the cause is remanded, with directions to overrule the demurrer to the petition, and for further proceedings not inconsistent with this opinion.

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CASE 85—PETITION ORDINARY—FEBRUARY 24.

Carrington vs. Herrin, &c.

APPEAL FROM LEWIS CIRCUIT COURT.

1. An officer transcended his authority by selling a horse under execution for forty-six dollars and five cents, and taking the purchaser's bond, payable to the plaintiff, for the whole of that amount, when the debt and costs did not amount to half that sum.
2. In order to protect himself from responsibility by taking an indemnifying bond, the officer must take the bond before the sale is made, and he should return it to the proper office whence the execution issued. (*Civil Code, secs.* 709, 710, 711.) A bond taken after the sale does not constitute a protection to the officer, if he were otherwise a trespasser.
3. HOUSEKEEPER.—Proof that a man with a family, in consequence of some domestic difficulty, had absented himself from his home, and was staying at the house of a sister, when his horse, his only work beast, was taken under an execution, is not sufficient evidence that he had ceased to recognize the residence of his wife and children as his home.
4. The object of the exemption from execution being the benefit of the family of a debtor by placing certain enumerated articles of property beyond the reach of creditors, the provisions of the statute should be fairly and liberally construed with reference to its object; and it would do violence to the beneficent object of the law to so construe it as to allow a mere neglect or dereliction of duty on the part of the head of a family, even if it be a temporary abandonment of his home, to deprive the wife and children of the rights which it was intended by the statute to secure to them.

E. C. PHISTER and
GEO. M. THOMAS, For Appellant,

CITED—

15 *B. Mon.*, 453; 7 *B. Mon.*, 587.
2 *Duvall*, 257; 1 *Bush*, 112.
Civil Code, secs. 34, 711.
3 *Metcalfe*, 389.

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THOS. J. THROOP and
G. T. HALBERT, For Appellees,

CITED—

Civil Code, secs. 709, 711, 719.

15 *B. Mon.*, 450–1; *Green vs. Gudehus.*

Revised Statutes, sec. 11, *chap* 30, *sec.* 1, *art.* 14, 1 *Stant.*, 486; *Ib.*, 423, 453.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

J. G. Herrin having in his hands, as constable of Lewis county, an execution for thirteen dollars and seven cents, against Daniel J. Carrington, in favor of S. B. Pugh, levied the same by direction of Pugh on a dun horse, the property of Carrington, on the 17th day of June, 1867, and although Carrington forbid the sale, claiming to be a housekeeper with a family, and that the horse was his only work beast, the officer sold the horse for forty-six dollars and five cents, and took the purchaser's bond payable to Pugh for the whole of the price, although the debt of Pugh did not amount to half of that sum.

Afterwards, Carrington brought this action against both Herrin and Pugh, alleging a wrongful seizure and conversion of the horse, which he averred was worth eighty-five dollars, and he prayed judgment against the defendants jointly for one hundred and fifty dollars in damages.

The officer filed his separate answer, alleging that the action as to him was barred, by the execution by Pugh of an indemnifying bond, according to the provisions of chapter 6 of the Civil Code of Practice. And the defendant, Pugh, not controverting the facts that the plaintiff was a married man with a family, and that said horse was his only work beast, resisted a re-

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covery mainly on the alleged ground that the plaintiff had ceased to be a housekeeper by abandoning his family and living apart from them.

The case was submitted to the court for trial without a jury, and the court rendered a judgment for the defendants, from which Carrington has appealed to this court.

As to the responsibility of Herrin, it seems to us that, besides the fact that he transcended his authority by taking the sale bond to Pugh so as to include the excess of the price of the horse over the amount of the execution, he did not so comply with the provisions of the Code by taking and returning the indemnifying bond as to exempt him from liability, if the horse was not subject to the execution. In order to protect the officer from responsibility, by the execution of a bond, it must be taken *before* the sale is made, and he should return it to the proper office whence the execution issued. (*Civil Code, secs.* 709, 710, *and* 711.) In this case the bond appears to have been taken *after* the sale was made, and it is not shown that it was returned, as required by the Code. It did not, therefore, in our opinion, constitute a protection to the officer, if he was otherwise a trespasser.

The only remaining question which we deem it necessary to determine, and upon which the liability of both of the defendants mainly depends, is, whether, at the time of the seizure of the horse under the execution, the plaintiff was a housekeeper with a family. As already suggested, it is not controverted that he had a family, and although it was proved, that, in consequence of some domestic difficulty, he had absented himself from his home, and was staying at the house of a sister when the horse was taken under the execution, there is no sufficient evidence in the record that he had ceased to

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recognize the residence of his wife and children as his home, or that any such change had occurred in his relations with them as could destroy or impair the peculiar rights which the law gave them in his property in consequence of those relations.

The object of the exemption being the benefit of the family of a debtor, by placing certain enumerated articles of property beyond the reach of creditors, the provisions of the statute should be fairly and liberally construed with reference to its object. And it would, in our opinion, do violence to the beneficent object of the law to so construe it as to allow a mere neglect or dereliction of duty on the part of the head of a family, even if it be a temporary abandonment of his home, to deprive the wife and children of the rights which it was intended by the statute to secure to them.

The plaintiff was, in our opinion, entitled to a recovery, and the court, therefore, erred in dismissing the action.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

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CASE 86—PETITION—FEBRUARY 24.

Foster, &c., vs. Wade and The Commonwealth.

APPEAL FROM SIMPSON CIRCUIT COURT.

1. An action against the sheriff and his sureties, for failing to pay over money collected by him *on an execution, from another county*, must be brought in the county in which the sheriff qualified. (*Civil Code, section* 94.)
2. *The court whence an execution issued*, which was directed to the sheriff of another county, *has no jurisdiction* of an action against such sheriff and his sureties for his failing to pay over money collected by him on such execution. That part of section 3, article 18, chapter 36, of the Revised Statutes, conferring jurisdiction on the court whence the execution issued in such cases, was repealed by the Civil Code, as the same took effect July 1, 1854.
3. The original Civil Code took effect August 1, 1851. The Revised Statutes took effect July 1, 1852, and repealed the Code so far as inconsistent with the Revised Statutes. But the Civil Code, as revised, amended, and completed by the commissioners, and adopted by the act of February 25, 1854, took effect July 1, 1854, and *repealed all laws coming within the purview of its provisions.* (*See Civil Code, secs.* 748, 908.)
4. After July 1, 1854, the Civil Code prevailed over the provisions of the Revised Statutes coming within the purview of the provisions of the Civil Code.

W. P. D. Bush, For Appellant,

CITED—

Revised Statutes, secs. 3, 4, *art.* 18, *chap.* 36.
Acts of March 22, 1851, *and January* 7, 1852, *adopting Revised Statutes, and sec.* 4, 1 *Stanton*, 177.
Civil Code, sec. 94 (*sec.* 120, *original Code*).
Act of Feb. 25, 1854, *rearranging Civil Code.*
Civil Code, secs. 748, 123.

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1 *Bush*, 384; *Bank of Kentucky vs. Harrison, &c.*
18 *B. Mon.*, 225; *Orth & Wallace vs. Clutz.*
18 *B. Mon.*, 572; *Madison and I. and P. R. R. Co. vs. Briscoe.*
17 *B. Mon.*, 410; *Tolly vs. Price.*

JOHN M. HARLAN, For Appellee,

CITED—

Revised Statutes, sec. 3, *art.* 18, *chap.* 36, 1 *Stanton*, 493; *Ib.*, 263, 439, 177.
Original Code, sec. 120.
Civil Code, secs. 94, 875, 740.
Ses. Acts, 1850–51, *pages* 106, 212; 1853–4, *pages* 24 *to* 56.
3 *Met.*, 324–5; *Mitcheson vs. Foster.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Appellee having an execution from the clerk of the Simpson circuit court against John Bomer, &c., had it directed to the sheriff of Allen county, where the defendants resided, which the sheriff collected but failed to pay over.

Appellees then brought this action in the Simpson circuit court against appellants, as the sheriff and his securities on his official bond, to recover the amount so collected, with interest. The court adjudged the amount with fifteen per cent. per annum from May 1, 1860, which is sought to be reversed.

The first serious question raised is as to the jurisdiction of the court.

By section 120, original Civil Code, which is section 94 of Myers' present Civil Code, "an action against a public officer for an act done by him in virtue or under color of his office, or for a neglect of official duty," must "be

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brought in the county where the cause, or some part thereof, arose."

The original Code was adopted March 22, 1851, and went into effect August 1, 1851.

By section 3, article 18, chapter 36, Revised Statutes (1 *Stanton*, 493), sheriffs and other like officers are held responsible for money collected on executions, and for fifteen per cent. per annum after proper demand; and "the remedy shall be by motion or suit in the court whence the execution issued."

These statutes, by first section, page 177, 1 Stanton, were to take effect July 1, 1852; and, by section 4, repealed the Civil Code previously adopted, so far as inconsistent with these provisions.

Section 120, original Code, then stands repealed, so far as the court's jurisdiction in such cases was concerned.

But the commissioners "revised, amended, and completed the Civil Code, and prepared the Code of Practice in Criminal Cases, all of which was reported to, and adopted by, the General Assembly at its last session," preface by the commissioners to second Code, dated September 2, 1854.

The Legislature, at its session 1853–4, did adopt the Civil Code as then reported, and enacted it should go into effect July 1, 1854 (*sec.* 908, *present Civil Code*); and subsequently, March 10, 1854, a supplemental act was enacted. (*Sec.* 909, *Civil Code.*)

By section 748, Civil Code, it is provided, that "the Code of Practice in civil actions, *as herein amended*, shall regulate the procedure in civil actions and proceedings in courts of this Commonwealth; and *that all laws coming within the purview of its provisions shall be repealed.*"

As the Civil Code, with its various amendments, were adopted subsequent to the recited provisions of the Re-

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vised Statutes, the provisions of the Code must prevail; hence, the Allen, and not the Simpson circuit court, had jurisdiction of the case.

As the case must be reversed for want of jurisdiction in the court below, the other errors assigned need not be noticed.

Wherefore, the judgment is reversed, with directions to dismiss the petition without prejudice.

CASE 87—PETITION EQUITY—FEBRUARY 25.

4b 631
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o105 194

Conner and wife vs. Downer, &c.

APPEAL FROM TODD CIRCUIT COURT.

1. A surviving husband, who never had actual seisin during the life of his wife, is not entitled to curtesy in her lands. At her death, her heirs-at-law became entitled to possession.
2. Although the proceedings for the sale of land for distribution were irregular, but not void, acquiescence in the sale for more than thirty years would repel the idea of fraud or unfairness in the procurement of the judgment or decree for the sale.
3. Possession of the purchaser and his vendees of land sold under a decree of court for distribution, is held to have been adverse to the original title-holders and distributees.
4. The period within which an action for the recovery of real property may be brought, *shall not, in any case, be extended beyond thirty years* from the time at which the right to bring the suit first accrued to the plaintiff, or the person through whom he claims, *by reason of any death or the existence or continuance of any disability whatever.* (*Revised Statutes, section* 5, *article* 1, *chapter* 63, 2 *Stanton*, 124.)

CALDWELL & KENNEDY, For Appellants,

CITED—

Revised Statutes, section 5, *chapter* 62.

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H. G. PETREE, For Appellees,

CITED—

Revised Statutes, *section* 5, *article* 1, *chapter* 63; *section* 18, *chapter* 80.

10 *B. Mon.*, 50; *Neely, &c., vs. Butler.*

9 *B. Mon.*, 60; *Orr vs. Holliday.*

6 *Mon.*, 179; *Adams vs. Logan.*

5 *Littell*, 315; *Garner's adm'r vs. Strode.*

2 *Duvall*, 284; *Lane vs. Berry.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

The grandfather of appellant, Mrs. Ann Eliza Conner, having died a resident of Virginia, devised to her mother a tract of wild land, in Todd county, Kentucky. The mother having died previous to the year 1835, also a resident of Virginia, this land descended to her four children and heirs-at-law.

The surviving husband, and father of appellant, Ann Eliza, never having had actual seisin, was not entitled to curtesy, therefore, she and her co-heirs were the holders of the legal title with the right of immediate entry.

In the year of 1835 this land was sold by virtue of a decree of the ——— circuit court, had upon proceedings in the name of Conner and wife and the other co-heirs, the object of which was a sale and division; and John Slaughter, the surviving husband and father, became the purchaser, got a deed, and afterwards sold the land. The present occupants, and those under whom they claim, by virtue of said sale, have had more than thirty years' possession before the bringing this suit in the year 1867.

Conner and wife brought this suit, asserting an undivided interest of one fourth in this land, and asking a partition on the alleged ground that they never author-

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ized the bringing the suit in 1835 to have it sold—knew nothing of it, and never got any of its proceeds.

Appellants then resided in Virginia; the father was a man of wealth; Conner had been in Hopkinsville shortly before the bringing the suit, and was at the boarding-house of the attorney who brought and conducted it, and who stood high in the profession. Some of the co-heirs have resided for a long time in the vicinity of the land, and Conner and wife have made several visits to the same neighborhood subsequent to said decretal sale, and for many years previous to bringing this suit; and when the purchasers of her father's title under said decree were erecting lasting and valuable improvements, and neither they nor their co-heirs asserted any title, nor have the other heirs as yet put up any claim, so far as appears in this record.

The father died intestate not many years before the bringing this suit, and, so far as may be judged from the evidence, appellants received by descent from him a sufficiency to make his warranty good. It is true the late war had seriously affected the father's estate, but the probabilities are that it was still sufficient for this purpose. The court had jurisdiction to order the sale in the first proceedings; though they seem to be irregular, yet they are not void. The circumstances indicate that appellants knew of the sale, and never repudiated it until after the close of the late war. The attorney who brought the suit removed long since to the Pacific coast; hence, positive authority to bring the suit has not been established. The purchase by a wealthy father; the ample opportunity that appellants had to know how those occupants claimed; having numerous relatives in the vicinity of the land, and themselves being in the neighborhood on several occasions after the sale, repel

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the idea of fraud or unfairness, or want of authority; but were this want of authority established, yet they would be barred by the lapse of time, as it is provided by section 5, article 1, chapter 63, 2 Stanton's Revised Statutes, 124, that "the period within which an action for the recovery of real property may be brought shall not, *in any case*, be extended beyond thirty years from the time at which the right to bring the suit first accrued to the plaintiff, or the person through whom he claims, by reason of any death, *or the existence or continuance of any disability whatever*."

Conner and wife having the right of immediate entry and possession upon the death of Mrs. Conner's mother, of course the possession of their father and his vendees under the decretal sale was adverse to them; and though she was then a *feme covert* and under disability, yet this cannot protect her for more than thirty years under the recited statute.

The policy of our statute is to protect married women and infants generally against the statutory bar by lapse of time; yet this must have a limit, else it works injustice to others, and disturbs the repose and security of proprietors; hence, the legislative policy is to quiet all title, notwithstanding disabilities, after thirty years' adverse possession; or, in other words, permits disabilities to prevent bar by lapse of time for only thirty years.

Wherefore, the judgment is affirmed.

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CASE 88—PETITION EQUITY—FEBRUARY 27.

Dye vs. Holland.

APPEAL FROM LARUE CIRCUIT COURT.

1. An action to recover for a deficiency of forty-one and three fourths acres in a tract of land sold in gross, which, by mistake, was estimated at two hundred acres, when it contained only one hundred and fifty-eight and one fourth acres, *must be brought within five years* of the date of the sale, or within five years after the deficiency or mistake ought to have been discovered by the exercise of ordinary diligence. In this case, the plea of the statute of limitations is sustained. (*Grundy's heirs vs. Grundy, &c.*, 12 *B. Mon.*, 271.)
2. In limitations to actions for mistakes, *the statute runs from the discovery, or from such time as, by the exercise of ordinary diligence, the mistake ought to have been discovered.*

W. B. READ, For Appellant,

CITED—

3 *Met.*, 368–9; *Fall vs. McMurdy.*
2 *Bibb*, 270; *Young vs. Craig.*
4 *Bibb*, 81; *Smith vs. Smith.*
2 *Dana*, 265; *Harrison vs. Talbot.*

ROBERT D. MURRAY, For Appellee,

CITED—

2 *Duvall*, 283.
Angell on Limitations, secs. 187, 190.
1 *Hilliard on Vendees, secs.* 23 *to* 26.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

Although the sale of the land to the appellant was not by the acre, but in gross, the deficiency proved of forty-one and three fourths acres in the tract, which was sup-

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posed to contain two hundred acres, was beyond the range of ordinary contingency, and such as would in proper time have entitled the appellant to relief, on the ground that he acted, in purchasing the land, under a palpable mistake as to its true quantity. Whether the action was barred by limitation, therefore, is the only material question to be determined on this appeal.

The correct rule for applying the statute of limitations in cases like this, which is five years, seems to be, that the statute shall run from the discovery of the mistake, or from such time as, by the exercise of ordinary diligence, it *ought to have been discovered* by the plaintiff. (*Grundy's heirs vs. Grundy, &c.*, 12 *B. Mon.*, 271.)

It sufficiently appears by the answer of the defendant, in connection with the argument of counsel, that the sale was made, and the plaintiff put in possession of the land, in 1854; and that the plaintiff, being sued for a balance of the purchase money in 1856, attempted to defend the action on the ground that the quantity of the land was deficient to some extent; and afterwards, in January, 1857, he accepted a deed from the defendant conveying the land by metes and bounds, as containing two hundred acres. He could then have discovered the mistake even by having the quantity calculated from the calls of the deed, and doubtless could have done so before from the boundary given in the bond for title, which he held. At all events, he could easily have solved any doubt as to the quantity of the tract by having it surveyed. This he failed to do, according to the statements of the petition, until the 11th of March, 1861, when, being about to sell the land to another, he caused a survey to be made, by which the tract appears to contain only one hundred and fifty-eight and one fourth acres and six poles; yet he did not bring this suit till the 3d day of November, 1862.

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If it be conceded that the appellant did not discover the deficit, or the extent of it, before the survey in March, 1861, still, in our opinion, he ought, with ordinary diligence, to have discovered it more than five years before he brought this suit, and the action was, therefore, barred by limitation.

Wherefore, the judgment is affirmed.

CASE 89—PETITION EQUITY—MARCH 1.

Beyland vs. Sewell and wife.

4bu 637
132 303

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. *The recital in a deed for land*, of what part of the consideration remains unpaid, as required by section 26, chapter 80, Revised Statutes (2 *Stanton*, 230), *is equivalent to an express lien reserved in the deed itself. The object of such recital is to secure a lien* in this statutory mode, and, consequently, when a lien is thus secured, no other cotemporaneous and collateral security can neutralize or defeat it any more than if it had been more expressly and explicitly reserved.

2. Beyland sold land in Campbell county, Kentucky, to J. W. Sewell and Harriet Sewell, his wife, and conveyed the same to Harriet Sewell, as recited in the deed, "*for and in consideration of twelve thousand nine hundred dollars, being two notes of D. S. Ogden, drawn by him to his own order, one for the sum of six thousand four hundred and thirty-two dollars and twenty-eight cents, the other for six thousand four hundred and sixty-eight dollars and seventy-six cents, of date May 1st*, 1865, *due respectively in five and six months, to him transferred by Harriet Sewell.*" These bills, payable at Ocean Bank, New York, where Ogden lived, were duly presented, and protested for non-payment. *Held*—That the above recital of the consideration cannot be consistently construed as an acknowledgment of payment by an acceptance of the bills haphazard as actual payment, and not as a

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mode of payment; that the deed reserved a lien unaffected by the bills, even if they were taken as collateral security; and that Beyland, holding a lien and offering to return the barren bills, the circuit court erred in dismissing his petition for enforcing his lien.

STEVENSON & MYERS, For Appellant,

CITED—

2 *Bush*, 90; *Long vs. Burke.*
Story's Equity, secs. 1224, 1226.
1 *Sch. & Lefr.*, 135; *Hughes vs. Kearney.*
2 *Ball & Beattie*, 514; *Saunders vs. Leslie.*
15 *Ves.*, 340; *Mackreth vs. Symmons.*
Adams' Equity, pp. 128, 129.
3 *Met.*, 285; *Muhling vs. Sattler.*
2 *Black.*, 458; *Chilton vs. Braden.*
5 *J. J. M.*, 323; *Richardson vs. Baker.*
1 *Dana*, 576; *Galloway vs. Hamilton.*
11 *Gill & John.*, 103; *Green vs. Fowler.*
10 *Yerg.*, 186; *High vs. Batte.*
1 *Met.*, 293; *Chambers vs. Keen.*
1 *Mon.*, 43, 44; *McClanahan vs. Chambers.*

J. R. HALLAM, For Appellees,

CITED—

5 *Lit.*, 194; *Brinker vs. Perry.*
1 *B. Mon.*, 251; *Simpson vs. Daniel.*
3 *Dana*, 597; *Perrin vs. Broadwell.*
2 *Bush*, 566; *Bowman vs. Curd.*
Revised Statutes, 2 *Stanton*, 230; *Myers' Sup.*, 741.
18 *B. Mon.*, 650; *Stockwell vs. Chapman.*
1 *Met.*, 563; *Cottman vs. Martin.*
1 *Met.*, 253; *Gritton vs. McDonald.*
2 *Duvall*, 390; *Gooch, &c., vs. Baxter.*
2 *Bush*, 90; *Long vs. Burke.*
2 *Bush*, 206; *Maupin vs. McCormick.*
17 *B. Mon.*, 143; *Neal vs. Davis.*

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Sugden on Vendors, 353.
6 *Ves., jr.*, 752; *Nairn vs. Prowse.*
2 *Maddock's Chancery*, 130.
3 *Mon.*, 72; *Honore's ex'rs vs. Bakewell.*
3 *B. Mon.*, 452; *Broadwell vs. King.*
10 *B. Mon.*, 282; *Muir vs. Cross.*
2 *Mar.*, 295; *Fowler vs. Rust's heirs.*
3 *Met.*, 285; *Muhling vs. Sattler.*
1 *Bush*, 635; *Martin vs. Hortin.*

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT:

To avoid the hazards to vendors and vendees of land resulting from constructive waivers of the implied liens of the common law, and to sub-purchasers, from questions of such lien, and of notice, the statute law of Kentucky, repudiating all such liens, provides, that "where any real estate shall be hereafter conveyed, and the purchase money, or any part thereof, shall remain unpaid at the time of the conveyance, the grantor shall not thereby have a lien for the same unless it be expressly stated in the deed what part of the consideration remains unpaid." (2 *Stanton's Rev. Stat.*, 230.)

This enactment, abrogating implied liens, and substituting a constructively express lien, operating, when recorded, as notice to creditors and subsequent purchasers and encumbrancers, makes the prescribed recital in the deed an express lien; for if, as declared, there can be no lien unless the recital be made, the logical consequence necessarily resulting from the recital is, that it shall import, and be equivalent to, an express lien reserved in the deed itself. The object of such recital is to *secure* a lien in this statutory mode; and, consequently, when a lien is thus secured, no other cotemporaneous and collateral security can neutralize or defeat it any more than if it had been more expressly and explicitly reserved.

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Beyland vs Sewell and wife.

In this case the appellant, Beyland, having sold to the appellees, J. W. Sewell and Harriet Sewell, his wife, thirty-nine acres of land near Newport, Kentucky, on the 13th of September, 1865, conveyed to the said Harriet the legal title to the land by a deed containing the following recital: "For and in consideration of twelve thousand nine hundred dollars, being two notes of D. S. Ogden, drawn by him to his own order, one for the sum of six thousand four hundred and thirty-two dollars and twenty-eight cents, the other for six thousand four hundred and sixty-eight dollars and seventy-six cents, of date May 1st, 1865, due, respectively, in five and six months, to him transferred by Harriet Sewell, of Hamilton county, Ohio."

Those bills, payable at the Ocean Bank of New York, where Ogden lived, were duly presented for payment, and were dishonored and protested, and still remain unpaid.

In April, 1866, the appellant, Beyland, brought this suit in equity for enforcing a lien claimed by him, as reserved by the foregoing recital. The answers deny the lien, and resist the prayer for relief. On the hearing the circuit court dismissed the petition, and Beyland appealed, and urges a reversal of the judgment.

The recital of the consideration cannot be consistently construed as an acknowledgment of payment by an acceptance of the bills haphazard, as actual payment, and not as a mode of obtaining payment. The appellant, unacquainted, as he seems to have been, with Ogden or his means, should not be presumed so reckless as to have parted with his title, and taken the bills as payment, without indorsement or any recourse on either Sewell or the land, in the event of non-payment by Ogden. Nor does the recital allow the imputation of any such insane

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temerity. It imports that the bills were taken for facilitating payment, without the circuity and delay of a suit against the land. If they actually paid the consideration, or were so intended, then the recital, *as made*, was motiveless and delusive, and the only proper recital would have been, that the consideration was twelve thousand nine hundred dollars "in hand paid." There could have been no other rational purpose in making the recital, as made, than to secure a lien on the land. It seems to us, therefore, that the deed reserved a lien, unaffected by the bills, even if they were taken as collateral security.

This conclusion dispenses with the unpleasant consideration of the question of fraud charged by the appellant, denied by the appellees, and litigated by the pleadings and other evidence.

Therefore the appellant, holding a lien, and offering, as he does, to return the barren bills, seems entitled to some relief, and the circuit court erred in dismissing his petition—Judge Peters dissenting.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

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CASE 90—PETITION ORDINARY—MARCH 1.

Millet & Co. vs. Watkins' adm'r.

APPEAL FROM HENDERSON COMMON PLEAS COURT.

In an action by a personal representative, a set-off verified by affidavit, and proved, without any demand for the payment thereof, may be plead by the defendant.

TURNER & TRAFTON, For Appellants,

CITED—

Revised Statutes, sec. 35, *art.* 2, *chap.* 37.
Civil Code, secs. 473, 126, 128.
1 *Met.*, 24; *Rogers vs. Mitchell's ex'rs.*
15 *B. Mon.*, 184.

MALCOLM YEAMAN, For Appellee,

CITED—

Revised Statutes, secs. 35, 36, *art.* 2, *chap.* 37.
3 *Met.*, 322–3; *Bennett vs. McCrocklin.*
15 *B. Mon.*, 184; *Thomas' ex'rs vs. Thomas.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The personal representative of John A. Watkins, deceased, brought this action in ordinary against appellants, on a demand alleged to be owing by them to their intestate.

Besides other defenses, appellants pleaded several matters of set-off in the third, fourth, and fifth paragraphs of their answer, all of which, on motion of appellee, the circuit court ordered to be stricken out,

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and the causes of set-off dismissed. Of which rulings appellants complain, and seek a reversal.

The claims pleaded as sets-off were verified by the affidavit of appellant, and proved; but no demand was made for their payment of the personal representative before they were pleaded in the action, and they were dismissed for want of such demand.

While the language of section 473, Civil Code, is imperative, that no suit shall be brought against a personal representative until after demand is made of him, accompanied with the affidavit required. And the enactment in itself is provident and beneficial in reaching the conscience of the claimant as to the justness of the debt, its freedom from usury, and other legal reasons for its non-payment, and in furnishing to the personal representative a sufficient voucher without incurring costs in useless litigation.

These reasons for requiring the demand do not apply when the personal representative has himself commenced the litigation, which necessarily involves the expenditure of money in costs, and he will have the judgment of the court as the evidence of the result. But it is contended that an answer in which a set-off is pleaded must contain a statement of facts sufficient to uphold a petition for the same cause of action; and, therefore, it is a suit or action, and to sustain it, the demand must be shown. The conclusion might follow if the postulate were true. It is neither in the common nor legal acceptation of the word a "*suit*" or action; no process is issued against or required to be served on the plaintiff; and, besides, it is in the Civil Code treated as a defense to an action treated of under the head of answer, and is allowed to defeat a suit. According to the letter of section 473, *supra*, therefore, a demand is

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not required, nor does its object require a demand before the set-off can be set up in an answer.

Wherefore, the judgment is reversed, and the cause is remanded, with directions to overrule the motion to strike out paragraphs numbers three, four, and five of the answer, and dismiss the set-off, and for further proceedings consistent herewith.

CASE 91—PETITION ORDINARY—APRIL 15.

Hardy, &c., vs. Trabue, Davis, &c.

APPEAL FROM CALLOWAY CIRCUIT COURT.

Two grounds in the alternative for an attachment—"*that the defendant has left the county of his residence to avoid the service of a summons, or so conceals himself that a summons cannot be served on him*"—are deemed sufficient, and attachment sustained. (*Wood vs. Wells, &c.*, 2 *Bush*, 197.)

See opinion for a review of evidence showing its sufficiency to sustain attachment on the above grounds.

FENTON SIMS and
JOHN RODMAN, For Appellants,

CITED—

Civil Code, section 289.
2 *Bush*, 197; *Wood vs. Wells.*
MSS. Opn., Dec., 1856; *Harrod vs. Orear.*
18 *B. Mon.*, 632; *Lane vs. Robinson.*
Hardin, 65; *Shipp vs. Davis.*
Pr. Dec., 220; *Cooper vs. Logan.*
1 *Duvall*, 345; *Dunn, &c., vs. Salter, &c.*

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Hardy, &c., vs. Trabue, Davis, &c.

W. J. STUBBLEFIELD and
J. F. BULLITT, For Appellees,

CITED—

1 *Duvall*, 342; *Dunn, &c., vs. Salter, &c.*
1 *Chitty's Pleadings*, 236–7; *Metford's Eq. Pl., s. p.* 39; *Story's Eq. Pl., sec.* 254.
M. & B.'s Digest, 158; *Act of* 1796.
Hardin, 65; *Skipp vs. Davis.*
Pr. Dec., 347; *Rees vs. Bishop.*
1 *Mar.*, 354; *Kennedy vs. Dillon.*
18 *B. Mon.*, 632; *Lane vs. Robinson.*
Notes c and d, Stanton's Code, 139.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

In May, 1866, H. Hardy, a resident of the county of Calloway—a farmer, merchant, and a dealer and speculator in tobacco—was indebted to various planters for their crops of tobacco, and to others on other accounts; his aggregate indebtedness being very large compared with the value of his estate and his means to discharge it.

A tobacco fair was held in Paducah on the *25th and 26th of May*, 1866. According to previous arrangements, Hardy had been selected as one of the judges of articles to be exhibited at said fair; and publication of the time, place, and objects of the fair, with the names of the judges, had been made for reasonable and proper time before it came off. For days, and weeks, perhaps, previously, Hardy had expressed his intention to his associates and neighbors, and to some of his creditors, to attend the fair.

On the morning of the 23d of May he set out for Paducah, distant forty-five miles from his home; arrived in Benton, Marshall county, early in the forenoon, having

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traveled to that place from home, a distance of eighteen or twenty miles, in about three hours, as he told Jones, a witness. He remained in Benton several hours—if on business, he failed to show it. He then left Benton, and went to Palma, eight miles on his way to Paducah; remained there with Mr. Wade, his brother-in-law, all night, and reached Paducah the next day, where the greater portion of the tobacco which he had purchased from the planters had been sent by him, to be sold during the fair, some of which arrived on the 23d, and the residue in a few days afterwards.

On the 29th of May he had not retured from the fair, and some of his creditors, on that day, instituted suits against him, with attachments, and during several other successive days other creditors brought their actions against him, with attachments, all of which were levied on the real and personal estate of said Hardy, or such of it as could be found in the counties of Calloway and Marshall.

Hardy returned home on the 7th of June, and, during the June term of the Calloway circuit court, which commenced the 11th of the month, he filed his affidavits in the several actions against him, controverting the grounds for suing out said attachments, and moved for their discharge; but his motions were overruled, the actions having been previously consolidated. In some of the cases, summons were executed on Hardy in time for judgments at the June term; and in some of those in which process had not been executed, he entered his appearance; but as he put in no answer, and did not controvert the alleged indebtedness in said cases, personal judgments were rendered against him, and the attachments were sustained. Of so much of the judgments as sustained the attachments, Hardy and others complain, and seek a reversal

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upon two grounds—*First.* "That the affidavits upon which the attachments, or some of them, were founded, are defective and insufficient;" and, *second.* That the judgment sustaining them was not authorized by the evidence.

In *Trabue, Davis & Co. vs. Hardy*, which was the first action brought in the list, the original grounds for the attachment stated in the petition are, that said "H. Hardy has left the county of his residence to avoid the service of a summons, *or* so conceals himself that a summons cannot be served on him."

Here two grounds for an attachment are stated, either of which of itself, and independent of every and all others, would be sufficient; but it is insisted in an able brief by the learned counsel for appellants that an attachment has never been sustained by this court where two or more grounds therefor are set forth in the affidavit in the alternative; and the case of *Shipp vs. Davis* (*Har.*, 65) is mainly relied upon as sustaining that position. That case, as the opinion shows, was decided upon the authority of the case of *Cooper vs. Logan* (*Pr. Dec.*, 320).

The attachments in both of these cases were issued under the *statute of* 1796 (*1st volume M. & Brown's Digest, p.* 158), the *5th section* of which provides, that it shall be lawful for any justice of the peace, upon complaint to him made by any person that his debtor *is removing out of the county privately*, or absconds and conceals himself so that the ordinary process of the law cannot be served upon him, to grant an attachment against the estate of such debtor. * * * * The grounds stated for the attachment in *Shipp vs. Davis, supra*, are, that "the said John Shipp *hath* privately *removed* himself out of the county, *or* so absconds and conceals himself that the ordinary process of the law cannot be served upon him."

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It is true, that, according to the terms in which the opinion is expressed, the attachment was quashed, *because the* complaint was not *positive*, but in the *alternative*, in not alleging positively that the defendant was *removing out of the county* privately, or that he so absconded and concealed himself that the ordinary process of law could not be served on him.

It is important to observe that the first part of the complaint, or first ground of attachment in this case, was wholly insufficient to sustain such a proceeding; it was in the past tense. The allegation is, that the defendant *had removed*. In that condition of the debtor the statute did not apply; it only applied when he *is removing*—the present tense; and this construction was given to it in *Davis vs. Edwards* (*Har.*, 342), and in *Kennedy vs. Dillon* (1 *A. K. Mar.*, 354). This objection, however, was not directly commented upon in *Shipp vs. Davis*, *supra*, if observed by the court; but in the case of *Davis vs. Edwards*, where the same defect in the complaint existed, the court said: "The present attachment is in the alternative—the one case clearly without the provisions of the statute, and the other cannot be said to be within it."

This defect in the statement of the complaint in *Shipp vs. Davis* may have escaped the attention of the court, as it was not commented on; but in *Davis vs. Edwards* it certainly did not, as appears from the quotation just made from the opinion in that case; and the language of the opinion authorizes the conclusion that the attachment was adjudged bad, on account of a substantial departure in the statement of the grounds for the attachment, rather than that the statement was made in the alternative. But be that as it may, it has not been directly decided in any of the cases referred to under the *act of*

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1796, *supra*, that an attachment would not be sustained where the grounds therefor were set out in the very words of the statute, because the two grounds were stated in the alternative, and, therefore, cannot be said to be in conflict with "*Wood vs. Wells* (2 *Bush*, 197," as contended by counsel for appellants.

It seems to be conceded, that if the ruling of this court in the last named case is adhered to, upon a reconsideration thereof, the grounds for the attachments in the larger number of these consolidated cases must be adjudged sufficient.

A review of the questions decided in the last named case, and also in the case of *Harrod vs. Orcar*, may be very proper, especially as distinguished counsel have expressed the opinion that the decisions in the two cases do not harmonize.

The affidavit for the attachment in the case of *Harrod vs. Orcar*, contained the single ground set forth in sub-section 7 of section 221, Civil Code, that the defendant had sold, conveyed, or otherwise disposed of his property, *or* suffered or permitted it to be sold, with the fraudulent intent to cheat, &c., &c.; and on the sufficiency of that affidavit the distinguished judge, who delivered the opinion of the court, said: "Although an affidavit presents several states of case in the alternative, either of which would be sufficient to sustain an attachment, yet as it was in the language of the Code itself, it must be deemed sufficient." These alternative grounds, as before noticed, are all contained in sub-section 7; but if the grounds contained in the 8th sub-section, immediately following the seventh, in these words: "Or is about to sell, convey, or otherwise dispose of his property with such intent," had been inserted in the affidavit in addition to the others, we cannot believe that a different opinion would have

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been the result, and the affidavit held insufficient, solely because the grounds were separated into two sub-sections, instead of all being in one. And if this opinion is to be sustained because all the grounds stated in the affidavit are contained in the same paragraph or sub-division, then the cases decided under the act of 1796 are clearly wrong, because the two grounds on which attachments were allowed under that act were in the same sentence or paragraph, and the case of *Harrod vs. Orear* overrules them.

The affidavit in *Wood vs. Wells*, *supra*, embraced the grounds contained in the 7th and 8th sub-sections of section 221, Civil Code, stated in the alternative, and was decided to be sufficient on the authority of *Harrod vs. Orear*; and now, after a review of the cases, we feel constrained to adhere to the decisions therein rendered as reasonable and consistent with the objects of the enactment. But the objection, if available, is only applicable to the cases of *Trabue, Davis & Co. vs. Hardy; Curd's ex'r vs. Same, and of Bamberger, Bloom & Bamberger vs. Same.* The grounds in all the other cases are stated positively. The affidavits, however, in all the cases, must be deemed sufficient, as held in the above cases.

The only remaining question is, does the evidence authorize the judgments sustaining the attachments?

Although Hardy was, at the time, heavily indebted, and his creditors importunate, still it was very natural that the fair at Paducah should attract the attention, and cause the attendance of purchasers of tobacco from different points, and he might, under such circumstances, consistently with good faith and fair dealing, have taken his tobacco there as a place where he would find a readier sale at higher prices, owing to the number

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of buyers and the probable competition among them, than could be realized in the county of his residence, or at his place of business. It might not only have been consistent with an honest purpose on the part of Hardy, but it would seem both judicious, and best for all parties concerned, that he should have transported his tobacco to that place, and have attended in person. His creditors so regarded it, for none of them brought suits, after he left home, until the 29th of May, giving him time, after the fair had closed, to return home. Going to Paducah and taking his tobacco there would not, of themselves, have been sufficient to fix an unlawful purpose or a fraudulent intent on Hardy.

Three principal reasons are assigned for his failure to return home at the close of the fair: 1. His great desire to make sale of his tobacco to enable him to pay those he owed for it. 2. His purpose to return with a stock of goods, which he was unable to procure in Paducah; and, 3. To effect a settlement with his partner Wade.

Rudolph proves he commenced negotiations with Hardy for the purchase of forty hogsheads of his tobacco on the 29th of May, which continued some ten days, at the close of which he purchased twenty-three hogsheads of him at about three thousand five hundred dollars. Why these negotiations were kept open so long, or whether a sale could not have been consummated within a shorter period, are not explained by Rudolph nor any other witness; and from the reading of Rudolph's deposition, it would appear that he and Hardy were engaged for ten days continuously in making the trade. But from other evidence it appears he left Paducah on the 30th of May to go to Mr. Wade's, in Marshall county, with whom he had business as he said. He, however, did not reach Wade's until about noon of the 31st of May, remained

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there till next morning, eight or nine o'clock; went to T. L. Jones's, about seven miles from Paducah, where he arrived about sun down; staid all night, and left next morning, the 2d of June, for Paducah. So that of the ten days which Rudolph says he and Hardy were engaged in making the trade for twenty-three hogsheads of tobacco, the latter was absent from the city the greater part of four, on business with Wade, which he proves was settled between noon of one day and eight or nine o'clock the next morning; but how long they were, *in fact*, engaged in the business, Wade was not asked, and did not state.

A. Johnson proves Hardy came to his house on the evening before the *fair*, and remained there until Wednesday morning afterwards. Jacobs, from whom he hired a horse to go to Wade's, proves he left on the 30th of May. If Johnson is right in the day of the week he left, he returned on Saturday; and Lee proves he went from Paducah to Evansville with Hardy, and returned with him, and that they left the former place on Sunday morning.

The sale to Rudolph was completed before he started to Evansville, and if it was commenced on the 29th of May, it could not have been on hand more than five or six days at most, nearly four of which Hardy was absent from the city.

But it is singular and significant that Hardy should have left the city at that time, when there was a prospect for a sale of a large portion of his tobacco, a matter of very great importance to him. If his business with Wade was indispensable, admitting of no delay, he could have shown it to be so by Wade; but he failed not only to examine him on that point, and to give any explanation of the character of that business, and by his own conduct

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showed that he did not deem it so important and pressing as to require his attention at that particular time.

He left home on the 23d, in time to have reached Wade's that day, and settled his business with him; he, however, remained several hours in Benton, without having any business to detain him, as far as is shown in this record; then goes to Wade's, and if anything was said by either of them on the subject of this business, except that Wade should go to Paducah during the fair to settle it, we are not informed; and that certainly was neither a suitable time nor place for such business, as it must have interfered with Hardy's engagement as judge of the fair, or taken his attention from the more important matter of effecting sales. Why the business was not adjusted between them on the 23d and 24th of May, is not answered nor explained satisfactorily.

Moreover, why did he not go directly to Wade's on the 30th from Paducah, if it was so necessary that this business should be attended to, and return as soon as it was completed? It is no excuse that he, on the 30th, went to visit his brother-in-law, Kuykendall. His business in Paducah was too important, and the demands of his creditors too pressing, to be neglected or postponed for the sake of a visit to a relative—a duty, if he felt it to be such, which he had neglected for about ten years before that particular time; and his conduct and delays, after he left Wade's, indicated a disinclination to hasten his return to Paducah.

These, with other facts and circumstances which might be added but for an unwillingness to extend this opinion (already too long), induce this court to concur in opinion with the court below.

Wherefore, the judgment is affirmed.

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CASE 92—EJECTMENT—APRIL 15.

4bu 654
131 761

Patterson, &c., vs. Hansel, &c.

APPEAL FROM TAYLOR CIRCUIT COURT.

1. Exceptions to depositions are deemed to have been waived when the record does not show they were acted upon by the circuit court.
2. A copy of a deed conveying land in Kentucky, which was made in Philadelphia, and duly acknowledged before and certified by the mayor of that city in 1807, and which was duly recorded in the clerk's office of the Court of Appeals of Kentucky in 1819, was properly admitted as evidence in the circuit court.
3. Persons in possession of land not as tenants of any one took leases from and held under the claimant, who asserted title to the land. Their possession from thenceforward was the possession of their landlord, and they would be estopped to deny his title, and, without renunciation and notice, their possession could not become adverse to such landlord.
4. When the statute of limitations has commenced to run against the ancestor in his lifetime, it will continue to run against his infant heirs, who would take the land under his will as purchasers, and not by descent.
5. It is only where all the plaintiffs are under disabilities that the running of the statute of limitations is prevented. (*Smith, &c., vs. Carney, &c.*, 1 *Littell*, 296.)
6. The limitation of seven years does not begin to run until the tenant relying on the statute has acquired a legal or equitable title, deducible from the Commonwealth. (*Neale vs. Robertson*, 5 *J. J. M.*, 213.)
7. The jury undoubtedly have the right in ejectment, as in other cases, to weigh probabilities and solve doubts as to matters of fact; but if, in their opinion, the preponderance of proof or of rational inference as to any fact on which the title depends be not on the side of the plaintiffs, they ought not to find for them. (*Griffith vs. Dickens*, 2 *B. Mon.*, 20.)

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W. B. HARRISON and
J. R. ROBINSON, For Appellants,

CITED—

Act of 1785, *M. & B.*, 433; *Act of* 1795, *Ib.*, 437.
Act of 1796, *Ib.*, 453; *Act of* 1831, *Ib.*, 453.
1 *Marshall*, 310; *Morgan vs. Beall.*
5 *J. J. M.*, 24; *Edwards vs. Hanna.*
4 *Littell*, 272; *Dunlap's heirs vs. McIlvoy.*
7 *B. Mon.*, 162; *Pierce's heirs vs. Patton.*
2 *Bush*, 453; *Terrill vs. Rankin.*
3 *B. Mon.*, 173; *Dennis vs. Warden.*
2 *Bibb*, 148–9; *Robertson vs. Morgan.*

KAVANAUGH and
A. J. JAMES, For Appellees,

CITED—

M. & B.'s Digest, 437, 438, 439, 453.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

As to the exceptions to the depositions of Mrs. Henry and others, the record shows that on the 14th March, 1868, exceptions were filed to them, but it does not show that they were acted on by the court, and this court must presume that the exceptions were waived, as has been repeatedly ruled.

It should be observed, that it is stated in the bill of exceptions, that on the trial, the plaintiffs read to the jury the depositions of Mary Henry, taken August 31st, 1836; J. *Barker*, taken June 3d, 1866; W. Butler, October 17th, 1835, "to which depositions the *defendant objects;* but the court overruled the objections, and the defendants excepted." Doubtless the name Barker, in the bill of exceptions, is so written by mistake for Jo. *Burden*, as the last name is attached to a deposition in the case, and the name of Barker is not found; besides, the date when the

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deposition was taken is also, by mistake, stated in the bill of exceptions to be "1866," when it should be "1836," as appears by the caption of the deposition.

Regarding the exceptions to the depositions as waived, the only objection which could arise would be as to the competency of their evidence.

The depositions of two of said witnesses were taken for the purpose of, and do identify, S. Ford, one of the grantees under whom plaintiffs claim, establish his death, and prove his heirs; and that of the other to identify the land, he having been one of the chain-carriers when the original survey was made; the evidence was, therefore, pertinent and competent, and was properly admitted.

The next alleged error which will be considered, is the admitting a copy of the deed of Reed and wife to James Glentworth, one of the lessors of the plaintiff, as evidence. That deed bears date the 18th day of November, 1807, and was acknowledged before the mayor of the city of Philadelphia on the 20th day of the same month and year that it bears date, but was not produced for record in this State until the 16th of January, 1819, when it, together with the certificate of the mayor of the city of Philadelphia of the due acknowledgment thereof before him by the grantors, was admitted to record in the office of the clerk of this court.

The power of the mayor of the city of Philadelphia, where the grantors resided at the time, to take their acknowledgement, or the sufficiency of his certificate to authorize the recording of the instrument in this State, are not questioned; nor is the authority of the clerk of the Court of Appeals to admit the deed to record in his office denied; but it is contended on behalf of appellants that it was not lodged for record in the proper office, within the time prescribed by the statute of Ken-

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tucky in force at its date; and, consequently, a mere copy, certified by the clerk of this court, was erroneously admitted as evidence on the trial of the case in the court below; and that the tenth section of the act of 1831 (1 *More. & Brown*, 453) is in conflict with the Constitution of Kentucky.

That section reads as follows: "That where deeds have been heretofore duly proven or acknowledged, or shall hereafter be so duly proven or acknowledged, but not recorded in the proper office within the time prescribed by law, such deeds may, nevertheless, be recorded in the proper office, where they have not been recorded, and from the time of recording be as effectual *to* all purposes as if recorded within the time prescribed by law; and where any such deed has been recorded, but not within the time prescribed by law, copies of the record of the deed shall and may be used as evidence in the same manner as if it had been recorded within proper time:

It is admitted that the Legislature, by said enactment, intended that copies of deed which had been previously recorded, but not within the time prescribed, should, nevertheless, be competent evidence. But the power of the Legislature is denied; and without referring to any particular *article or section of the Constitution*, counsel say: "It will hardly be pretended that the Legislature can, by an act, directly take private property from one individual and confer it upon another," &c., &c.

In answer to this argument in part, it may be remarked, that recording of a deed, or the lodging it in the proper office for record, does not pass the legal title to the vendee; the legal title passed by the execution and delivery of the deed by Reed and wife to Glentworth. It was effectual for that purpose, not only as to the parties

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thereto, but as to all others, except creditors and subsequent purchasers, without notice. This doctrine is too familiar and too well settled to require any citation of authority. The act of 1831, *supra*, deprived Reed and wife of no right, and conferred none on their vendee. It only authorized a certified copy of their deed to be substituted *as evidence*, instead of requiring parties who needed the evidence to introduce and prove the execution of the original deed for that purpose.

By the *act of* 1785, eighteen months were allowed to offer the deeds of non-residents to the proper officer for record, after the acknowledgment thereof; and by the *act of* 1796, the time for offering such deeds for record, after the proper authentication of the acknowledgment thereof, was limited to eight months. By section 15, chapter 24 (1 *vol. Rev. Stat.*, 280–1), deeds, other than deeds of trust and mortgages, shall not be good against a purchaser for a valuable consideration, or any creditor, except from the time the same shall be legally acknowledged or proved, and lodged for record, unless the same shall be so lodged within eight months from the date thereof by a citizen of Kentucky; if not a citizen of Kentucky, but a citizen of the United States, then within twelve months; and if not a citizen of the United States, then eighteen months. And by section 23 of Revised Statutes (1 *vol.*, 283), it is provided that deeds (except of married women) legally executed, but not recorded nor lodged for record in proper time, may be proved or acknowledged and recorded, and be as effectual from the time of so recording as if recorded in proper time, which is in effect and substantially a reenactment of the *act of* 1831. These statutes have not only legislative sanction, but have been acquiesced in by the country, the first for about twenty years, and the

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last approaching that period; and while we are not aware of any case decided by this court in which the validity of either statute was direetly involved, in the case of *Applegate vs. Gracy* (9 *Dana*, 215), the 10th section of the act of 1831 was incidentally before the court and commented on, and no doubts were then expressed of its validity.

The principal object for requiring the registration of deeds, being for the protection of purchasers for value without notice, and of creditors, their rights were not prejudiced by the helping *act of* 1831, as construed heretofore by this court in the case *supra;* and as to all others, it only changes the rule of evidence, which the Legislature had the constitutional power to do; consequently, the copy of the deed was properly admitted.

The only remaining question to be considered, is as to the propriety of giving certain instructions asked for by appellees, and refusing some which appellants asked. Instructions numbered *one*, *two*, *three*, *and six*, given at the instance of appellees, present, in effect, the same principles of law applicable to the two parcels of land claimed respectively by appellants; and while they are not presented in as perspicuous language as is to be desired, still no valid or available objection to them can be perceived. They inform the jury, as proposition of law, that if they believe from the evidence that the persons therein named, while they were in possession of the land, not as tenants to any one, and owing no allegiance to any one as landlord, took leases under appellees' title, and held under them, their possession from thenceforward was the possession of their landlords, and they would be estopped to deny their title. This doctrine has been repeatedly recognized by this court.

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The sixth instruction, as we understand it, informs the jury that if they believe from the evidence that those under whom appellants claim had been tenants of appellees, they must believe from the evidence that they had renounced their tenancy, and had given their landlords notice of such renunciation, and since then had been adversely and continuously possessed of the land for twenty years before the commencement of the suit; and thus understanding the instruction, it is in accordance with the previous rulings of this court.

As a proposition of law, instruction No. 5 cannot be maintained. First Ford's heirs, as appears from his will, took as purchasers, and not by descent; consequently, if the statute had commenced running in the lifetime of their ancestor, it continued to run against them. Moreover, their father and Reed held the title to the land jointly, and when they acquired title, neither Reed nor Glentworth, his subsequent vendee, labored under any disability; consequently, the operation of the statute was not obstructed. It is only where all the plaintiffs are under disabilities that the running of the statute is prevented. (*Smith & Co., vs. Carncy et alios*, 1 *Littell*, 296.)

This instruction being erroneous, the question arises, were appellants prejudiced by it?

This court decided in *Neal vs. Robertson* (5 *J. J. Mar.*, 213), that the limitation of seven years does not begin to run until the tenant, relying on the statute law, has acquired a title, *legal or equitable*, deducible from the Commonwealth.

Appellants do not connect themselves by any documentary evidence of title whatever with the patent to James Pierce for one hundred and ten and three quarter acres, dated 29th of December, 1826, which they ex-

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hibited; and as to the patent to William S. Patterson and Jeremiah S. Pierce, that issued in December, 1832, less than two years before the action was commenced. The statute was, therefore, wholly unavailing to appellants, as they had failed to connect themselves with any documentary title a sufficient length of time before the action was commenced, and they were not prejudiced by the instruction.

Instruction E, asked by appellants, was properly refused; it was calculated to mislead and confuse the jury. As was said by this court in *Griffith vs. Dickens*, (2 *B. Mon.*, 20), the jury undoubtedly have a right in ejectment, as in other cases, to weigh probabilities and solve doubts as to matters of fact; but if, in their opinion, the preponderance of proof, or of rational inference as to any fact on which the title depends, be not on the side of the plaintiffs, they ought not to find for them; and to this extent, and no further, ought the proposition to go.

Instruction L relates to the rejection of the deed from Reed to Glentworth, and, for the reasons already stated, it was properly refused.

As to instruction M, it assumes that there had been an adversary holding against Reed, &c., for more than twenty years, and then proposes to submit an inquiry into a fact about which there was no evidence; consequently, it should not have been given.

There was no evidence conducing to show that there were any other persons in Philadelphia of the same Christian and surnames of the patentees, and the instruction K was, therefore, properly refused.

Perceiving no error prejudicial to appellants, the judgment must be affirmed.

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CASE 93—PETITION ORDINARY—APRIL 16.

4bu 662
13? 304

Bondurant vs. Owens.

APPEAL FROM FULTON COMMON PLEAS COURT.

1. *A lien for purchase money*, reserved by a vendor in a conveyance to his vendee, is not such an encumbrance as is embraced in, and provided for by, section 1, article 15, chapter 36, Revised Statutes (1 *Stanton*, 488), regulating sales of encumbered property under execution.
2. The said provisions of the Revised Statutes regulating sales of encumbered property under execution *do not apply to vendor's liens which were not created by "mortgage, deed of trust, or otherwise,"* after the vendee became possessed of the legal title.
3. The vendee's legal title to land, which is encumbered by a lien for unpaid purchase money reserved in his vendor's conveyance, is subject to levy and sale under execution by virtue of section 1, article 13, Revised Statutes (1 *Stanton*, 482).
4. The purchaser under execution sale of land so encumbered by a vendor's lien acquires all the title of the execution defendant subject to the vendor's lien; and in case the land sold for less than two thirds of its valuation, also subject to the right of redemption within one year: The purchaser having received the sheriff's deed, by paying off the vendor's lien, becomes possessed of the absolute title to the land, and the execution defendant has no right of redemption under section 1, article 15, chapter 36, Revised Statutes.
5. So far as this case is inconsistent with *Hinton vs. Mitchell, &c.*, 1 *Duvall*, 382, the latter is overruled.

WM. LINDSAY and
JOHN RODMAN, For Appellant,

CITED—

Civil Code, sec. 125.
15 *B. Mon.*, 604–5; *Petty vs. Malier.*
15 *B. Mon.*, 73; *Smith vs. Moberly.*
Revised Statutes, sec. 1, *art.* 15, *chap.* 36.
2 *Bibb*, 94; *Allen vs. Sanders.*

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CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This whole case proceeded on the mistaken theory that it was governed by section 1, article 15, chapter 36, 1 Stanton's Revised Statutes, 488, which is as follows: "Where the defendant in an execution *shall have owned the legal title* in any real or personal estate, and *have created a bona fide encumbrance thereon, by mortgage, deed of trust, or otherwise*, before an execution has created a lien on the same, the interest of the defendant in such property may be levied on and sold subject to such encumbrance. 1. The purchaser at the sale shall acquire a lien on such property for the purchase money, and interest after the rate of ten per cent. per annum from the day of sale until paid, subject to the prior encumbrance."

This was an adoption, with some alteration, of our old statute subjecting the right of redemption of mortgagors to sale under execution. (*See* 1 *Morehead & Brown's Stat. Laws*, 653.) The rights of the purchaser under such sales were different. Under the old statute, the purchaser, by paying off the encumbrance, became possessed of the absolute title, but, under the Revised Statutes, merely acquires a lien for the purchase money, with ten per cent. per annum interest.

But the Revised Statutes, no more than the former statutes, applied to vendor's liens which were not created by "mortgage or deed of trust or otherwise," by the *defendant in the execution after he became possessed of the legal title*, but was a lien reserved by the vendor when he conveyed the title. The legal title in such cases passes to, and remains in, the vendee, subject, however, to the vendor's lien; whereas, when the defendant has been possessed of the legal title, and conveys it as a security for a debt, by mortgage, deed of trust, or otherwise, the legal title passes out of him, and he has but an *equity of*

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redemption, which could not be levied on and sold by execution but by express statutory provision. It was the object both of the former and Revised Statutes to make this redemption right leviable, and subject to execution sale. But a vendor's lien, reserved in the deed of conveyance, can in no legal sense be termed a *right of redemption* in the vendee, for he is, by said deed, invested with the entire legal estate, subject, however, to the vendor's lien.

It is the *interest* of the mortgagor which is subject to sale under this statute. But the vendee's title, when it is conveyed by the vendor subject to his lien, is liable to be levied and sold under execution by virtue of section 1, article 13, same chapter and book, page 482.

When G. W. L. Marr sold and conveyed the lot in contest to Mrs. A. A. Roulhac, there was a vendor's lien specified for two hundred and twenty-five dollars of the unpaid purchase price. She afterwards sold and conveyed said lot to Frank Roulhac without specifying any lien, who afterward sold and conveyed it to appellee, setting out the unpaid purchase price of two hundred dollars, and thereby reserving a vendor's lien.

Richard Owens being invested with the legal title and possession, his execution creditors, Munn & Co., had a right to have the property levied on and sold, which they did, and became the purchasers at less than two thirds of its appraised value: subsequently to which Coker, Young & Co., being also execution creditors of said Owens, had his equity of redemption levied on and sold, and which they purchased; and having redeemed from Munn & Co., and Owens not having redeemed from them within the statutory period of the redemption privilege secured to the execution debtor, they took the sheriff's deed, and possession of the house and lot. They subse-

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quently sold and conveyed it, and, after passing by several other conveyances, it came to appellant's possession by a regular derivation of deeds as aforesaid.

In the meantime, both the administrators of G. W. L. Marr and Frank Roulhac had filed petitions to enforce the vendor's lien of their respective decedents; and said property had been adjudged to be sold in satisfaction thereof, when Roulhac & Lauderdale, who had become intermediate vendees and vendors between Coker, Young & Co. and appellant, purchased a portion of the lot in satisfaction of said judgments enforcing the vendor's liens.

In this State of affairs Richard Owens, supposing that his various execution creditors had acquired but a lien and not the legal title, brought suit in ordinary to recover said house and lot, to which defendant answered, setting out the various execution sales and the purchases thereunder, the sheriff's deed, and various vendors' deeds down to himself; and also that he had made lasting and valuable improvements worth some six hundred dollars, and had paid taxes on said property of some fifty dollars, and asked that the cause be transferred to the equity docket, which was overruled, and exception.

It is very evident that if the execution sale and sheriff's deed did not vest Coker, Young & Co. with the legal title and absolute ownership, but merely gave them a lien, then the case should have been transferred to equity, and the whole case adjusted upon equitable principles. If it did, however, invest them with the legal title and absolute ownership, as we think was unquestionably the case, then the judgment in Owens' favor for the recovery of the house and lot was radically erroneous, as his suit should have been dismissed absolutely.

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Although we see no waiver of the jury, it is evident that the court tried it, probably by the consent of the parties. So far as this case is inconsistent with *Hinton vs. Mitchell, &c.* (1 *Duvall*, 382), the latter is overruled.

Wherefore, the judgment is reversed, with directions for further proceedings consistent with this opinion.

CASE 94—PETITION EQUITY—APRIL 16.

Colsten's heirs vs. Chaudet, &c.

APPEAL FROM MARSHALL CIRCUIT COURT.

1. Testator, who resided and died in Virginia, made and published his will in 1818, and in 1820 appended to it the following codicil: "All the lands I hold in the States of Kentucky, Ohio, and Illinois, shall be, and *are hereby, constituted a fund for the payment of my debts;* and I hereby authorize and direct my executors to sell and dispose of my said western lands in such manner, and upon such terms, and at such times as they shall deem most advantageous, and to apply said western lands themselves, or the proceeds of sale thereof, so far as necessary, to the payment of my debts. If any balance of said fund hereby provided for the payment of my debts shall remain, after satisfaction thereof, the same shall be distributed as in the residuary clause of my will above directed." Testator nominated three executors. The surviving and only acting executor, who qualified as such in Kentucky, in 1847, by a written power of attorney, authorized his agent to sell the lands in Kentucky, which were embraced in the above codicil. In 1850 said agent sold and conveyed certain tracts of said land. In 1857, the heirs of the testator brought suit against subsequent vendees in possession to recover the lands so sold. This suit was transferred to equity on motion of defendants. *The circuit court dismissed the petition of said heirs, and that judgment is affirmed. Held—*

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First. That it was the intention of the testator to convert the whole of this land into money.

Second. That, as the trust was confided to his executors, the title vested in them, just as if it had really been converted; for in equity, that which should be done will be regarded as done, and, of consequence, the trust could be executed by the surviving executor. The land could be sold and conveyed by him; and especially as our statute (1 *Morehead & Brown's Statutes, page* 666) fully authorized the surviving executor to sell the lands devised to be sold.

Third. That the surviving executor, being invested with the title, and the right to sell and convey, he could delegate either generally or specially his own authority, and that his sale by his authorized agent was as effectual as if made by himself.

2. When a sale and conveyance of land has been made by an agent under a genuine power of attorney, the acknowledgment of which was defective, the chancellor should compel a proper conveyance, unless there should be other sufficient preventing causes.

3. Whatever may have been the character of the commerce between the agent making the sale of the land, and his vendee, in making the purchase, the innocent vendees of the latter, in good faith, for valuable consideration, could not be affected thereby.

W. G. BULLITT and
STEVENSON & MYERS, For Appellants,

CITED—

Civil Code, sec. 588.
MSS. Opn., January, 1863; *Breden vs. Bittison.*
3 *Met.*, 96; *Haney vs. Tempest.*
1 *Williams on Executors, s. p.* 579, *s. p.* 849; 2 *Ib.*, 617.
1 *Met.*, 264; *Allen and wife vs. Vanmeter's devisees.*
4 *Lit.*, 400; *May's heirs vs. Frazier.*
3 *J. J. M.*, 246; *Coleman vs. McKinney, &c.*
13 *B. Mon.*, 365; *Jones vs. Letcher.*
13 *B. Mon.*, 380; *Garrett vs. Gault.*
Sugden on Vendors, 3d *Amer. ed., s. p.* 214.
4 *Johnson's Chy. R.*, 368; *Berger vs. Duff.*
2 *Dana*, 75; *Muldrow's heirs vs. Fox.*
3 *Bibb*, 351; *Wooldridge vs. Watkins.*

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Sugden on Powers, 177.
9 *Dana*, 102; *Pebles vs. Watts*; 9 *B. Mon.*, 578.

L. D. HUSBANDS, For Appellees,

CITED—

Civil Code, *sec.* 125.
3 *Bibb*, 351; *Wooldridge vs. Watkins' ex'rs, &c.*
3 *Mar.*, 132; *Anderson vs. Turner.*
3 *J. J. M.*, 246; *Coleman vs. McKinney.*
2 *Dana*, 75; *Muldrow's heirs vs. McKinney.*
4 *Lit.*, 400; *May's heirs vs. Frazier.*
4 *Johnson's Chy.*, 368; *Berger vs. Duff.*

CHIEF JUSTICE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Rawleigh Colsten, of Berkley county, Virginia, published his will September 26, 1818, by which he devised his Kentucky land, with certain exceptions, to his three sons, Edward, Thomas, and Rawleigh Traverse, and his son-in law, Benjamin Watkins Leigh, "in trust to be by them sold and disposed of, if, and in such manner, as they should think best, hereby giving them and the survivor of them as full power for the sale and disposition of this property as I might myself exercise; and in trust further, that they shall divide the said land in kind, or the proceeds thereof, shall they deem it prudent to sell the same, equally between all my children;" and nominated his sons, Edward and Thomas, and his son-in-law, Benjamin Watkins Leigh, his executors.

By a codicil of September 2, 1820, finding himself unexpectedly involved for large sums of money, he revoked this, together with other devises, and directed, among other things, that "all the lands I hold in the States, Kentucky, Ohio, and Illinois, shall be, and are hereby, *constituted a fund for the payment of my debts;* and I hereby authorize and *direct my executors to sell and dispose of*

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my said western lands, in such manner, and upon such terms, and at such times, as they shall deem most advantageous, and to apply said western lands themselves, or the proceeds of sale thereof, so far as necessary, to the payment of my debts. *If any balance of the said fund* hereby provided for the payment of my debts *shall remain*, after satisfaction thereof, the same shall be *distributed* as in the residuary clause of my will above directed."

November 6, 1847, Edward Colsten, as the only surviving acting executor of his father's will, and the only one who ever qualified in this State, by written power of attorney, authorized R. G. Samuels "to take charge of and to rent, lease, *sell*, or otherwise to dispose of," all the Kentucky lands devised to be sqld by Rawleigh Colsten in his will. Samuels, as agent under said letter of attorney, sold and conveyed to Trabue the one thousand acre tract in Marshall county, now in controversy.

January 1, 1850, Trabue sold and conveyed it to H. Monsarratt.

January 13, 1853, Monsarratt sold and conveyed it to Wm. Ramsay, who, on December 3, 1853, sold and conveyed it to Nelson Shields, who, and those claiming under him, are now in possession, and the defendants to this suit.

Edward Colsten, in the year 1850, revoked his power of attorney to said Samuels.

April 3, 1857, appellants, as heirs and devisees of Rawleigh Colsten, brought an action ordinary to recover said land.

November 11, 1857, the answer of all the defendants (but Shields and his amended answer) was filed to said petition, and on their motion, it was ordered that this case be transferred to the equity side of the docket, and consolidated with the case of *Colsten, &c., vs. J. Chaudet, &c.*,

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and the answer filed in this case to be taken as their answer in the case on the equity side of the docket; and leave was given to the plaintiffs to file an amended petition.

An equity suit by the same plaintiffs against the same defendants had, at the same time, been filed for staying waste of timber, &c.

September 30, 1858, appellants also brought an ordinary suit in the Marshall circuit court against L. M. Flournoy and others, to recover another tract of one thousand acres in said county. A portion of the pleadings in said case are copied; but it is evident, that, though it appears said suit had been also transferred to equity, and consolidated with the one against Chaudet *et al.*, that it was not adjudicated nor regarded by the court; hence, all that part of the record belonging to said suit is irrelevant and surplusage, and will be no further regarded by us.

The court having dismissed appellant's suit against Chandet *et al.* absolutely, they have appealed.

The cause involves—1. An inquiry into the power of the surviving and only acting executor to sell or delegate the power of sale and conveyance.

2. Whether the letter of attorney to R. G. Samuels should be regarded as established.

3. Whether the title of these appellees can be disturbed because of any alleged fraud between Trabue, the purchaser, and Samuels, the agent.

In Story's Equity Jurisprudence, volume 2, section 1062, it is said: "It is a general rule of law, that a mere naked power given to two cannot be executed by one; or given to three, cannot be executed by two, although the other be dead; for, in each case, it is held to be a personal trust in all the persons, unless some other lan-

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guage is used to the contrary. Then, suppose a testator, by his will, should give authority to A and B to sell his estate, and should make them his executors. In such a case, it has been said, that the survivor could not sell; but if the testator should give authority to his executors, *eo nomine*, to sell, and should make A and B his executors, then, *if one should die, the survivor, it has been said, could sell.* The distinction is nice; but it proceeds upon the ground that, in the latter case, the power is given to the executors, *virtute officii;* and, in the former case, it is merely personal to the parties named."

And in Sugden on Powers, chapter 3, section 2, article 1, page 165, it is said: "That where the authority is given to executors, and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it."

In section 1060, Story's Equity Jurisprudence, it is said, that "if a testator should order his real estate, or any part thereof, to be sold for the payment of his debts, without saying who should sell, in such a case, a clear trust would be created. * * * * * In the case put, of a trust for the payment of debts, if executors are named in the will, they will be deemed, by implication, to be the proper parties to sell; because, in equity, when lands are directed to be sold, they are treated as money; and as the executors are liable to pay the debts, and if the lands were money, as they would be the proper parties to receive it for that purpose, courts of equity will hold it to be the intent of the testator that the parties who are to receive and finally execute the trust are the proper parties to sell for the purpose."

In section 790, 2 Story's Equity Jurisprudence, it is said, that "land directed or devised to be sold and turned into money is reputed as money."

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And in section 791 it is said, "the ground of this latter doctrine is, that courts of equity will regard the substance, and not the mere form of agreements and other instruments, and will give them the precise effect which the parties intended in furtherance of that intention. It is presumed that the parties, in directing money to be invested in land, or land to be turned into money, intended that the property shall assume the very character of the property into which it is to be converted, whatever may be the manner in which that direction is given."

In Mr. Cox's valuable note to *Cruse vs. Bailey* (3 *P. Will.*), it is said: "If a testator should direct that his lands should be sold for the payment of his debts, or for other purposes, the question would arise, whether he meant to give the produce of his real estate the quality of personalty to all intents and purposes, or only so far as respected the purposes of his will; for, unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but further, that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or of the produce of it, as may not, in the event, be required for any purposes of the will, from any cause whatsoever, will result to the heir-at-law."

And in the able and exhaustive opinion of the Supreme Court of the United States, by Mr. Justice Washington (3 *Wheaton*, 563), this doctrine has a strong application; for that was a devise by Robert Craig of his lands in Virginia to certain trustees, to be sold and the proceeds paid over to his alien brother, Thomas Craig. As the testator had no relatives who could claim

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and hold the lands as heirs-at-law, the State of Virginia claimed in their stead, by escheat, upon the principle and authority of *Roper vs. Radcliffe* (9 *Mad.*, 167, 181), in which the King's bench, by six to five judges, decided, that, under the British statute, a Papist could not take land, nor any interest or profits or proceeds arising therefrom, and that, on a devise to sell the lands and pay the proceeds over to a Papist legatee, the Crown, being entitled to claim by escheat when there was no one to do so as heir-at-law, was entitled to the rights of such heir, and that he would be entitled to a resulting trust so far as it would be of value after paying debts and legacies; and that he could come into equity and restrain the selling more than would be sufficient for such purpose, or he could pay these himself and demand a conveyance, and that equity will extend the same privilege to the residuary legatee; and, therefore, deduced from these principles the conclusion, that, as to such legatee, such a devise is to be deemed land in equity and not personalty; but the Supreme Court, with distinguished ability, scattered the sophistry and artificial reasoning of this case, overwhelmed it with an array of authority, and decided that, by the will of Robert Craig, he had converted his land into money, and had devised the money to his alien brother, who could take it, but not land, under the laws of Virginia, saying: "It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money absolutely and entirely, and not merely to serve the pur-

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poses of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him, and partakes of the old use as if it had not been directed to be sold."

By the codicil, the testator, Rawleigh Colsten, constituted *this land a fund for the payment of his debts*, and expressly *directed* his *executors* to *sell and dispose* of it; and if *any balance remained* after payment of debts, it was to be *distributed* according to the provisions of the residuary clause of his will. More clearly defined and emphatic intention to convert the whole of this land into money for the purpose of paying debts, and distributing any surplus which might remain, could not well be expressed.

It then necessarily follows, that as this trust was confided to his executors, the title vested in them just as if it had really been converted; for in equity that which should be done will be regarded as done; and of consequence the trust could be executed by the surviving executor—the land could be sold and conveyed by him, especially as our statute (1 *Morehead & Brown's Statutes*, *page* 666); fully authorized the surviving executor to sell the lands devised to be sold.

"Every person," says Story on Agency, section 2, "not under disability, is treated as being *sui juris*, and capable not only of acting personally in all such matters, by his own proper act, but of accomplishing the same object through the instrumentality of others to whom he may choose to delegate, either generally or specially, his own authority for such purpose," and "hence the general maxim of our laws, subject only to a few exceptions, is, that whatever a man, *sui juris*, may do of himself, he may do by another; and as a correlative of the maxim,

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that what is done by another, is to be deemed, done by the party himself."

Had this devise been a mere naked power and a personal trust, it would have fallen within these exceptions; it, however, is not such, but is a full investiture of the title, as of personalty, in the executors, in their fiducial character, to be disposed of for the purposes of paying debts and distributing the remaining proceeds.

As to the authentication of the power of attorney, but little need be said. Even if it be conceded, as perhaps it should be, that the certificate of the two Virginia justices of the peace, who certified its acknowledgment, was legally defective, in not certifying that the principal subscribed it in their presence; yet their authentication rendered it morally certain that it was executed. But the original letter of attorney was made an exhibit in an amended pleading, and its authenticity has not been controverted; indeed, the amended petition of appellants, filed February 21, 1867, confesses it by saying, "that said Edward, after such qualification in Kentucky, executed a power of attorney to one G. R. Samuels (should be R. G. Samuels), authorizing him to sell said land."

It is true, in a subsequent part of this amended petition, in relation to the copy of the power and its authentication, they say: "If ever executed at all, was in itself, and in its effects, a nullity as matter of law;" and that it "has not upon its face, nor in its proof and authentication, any evidence sufficient in law to prove its execution, and, therefore, they do deny that said paper referred to was executed by said Edward Colsten." This is a special denial, predicated on the defective authentication, and not on the real genuineness of the instrument; therefore, the chancellor would regard it as effective authority,

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and if it did not legally authorize a conveyance of the title, would compel the parties to execute a conveyance in accordance with its provisions, unless there should be other sufficient preventing causes; and whilst it would have been more formal to have ordered a conveyance, yet, as appellants will be barred by the judgment, the legal effect will be the same.

A judgment of the Graves circuit court annulling the sale and conveyance of lands by Samuels to Trabue is set up, but not filed; but the allegation shows that this proceeding and judgment was after Trabue had sold this land to Monsarratt; for it avers and charges "that all of said purchasers of the land in this case were *lis pendens* purchasers, and their purchases, except that of Monsarratt, as before said, were made after these plaintiffs had brought their cross-suit aforesaid in Graves against Samuels, Trabue, and others."

This judgment was rendered in a suit brought by Trabue to perfect said power of attorney to Samuels, and his conveyances under it, against the executor and unknown heirs of Rawleigh Colsten, in which said heirs and appellants filed an answer and cross-petition.

But as Monsarratt, the vendee of Trabue, was not a party, he could not be affected by that litigation; and, indeed, if he had been a party, his title could not have been disturbed, unless it had been shown he was not a *bona fide* purchaser for a valuable consideration; for whatever may have been the character of commerce between Samuels and Trabue, the innocent vendees of the latter could not be affected thereby, and who had parted with a valuable consideration, relying upon Samuels' authority and the evidence of sale from him. And, as Monsarratt is not and could not be affected by said adjudication, and nothing in this case contaminating him with bad faith,

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his vendees cannot, any more than himself, be affected by such; neither are they affected by it, because they are neither parties nor *lis pendens* purchasers, but are invested with all the rights and equities of their remote vendor, Monsarratt.

Although the case was transferred to equity on motion of defendants, this was neither objected to nor exceptions taken at the time, so far as appears from this record, and is not, therefore, now an available error.

As by order of court the original answer to the suit in ordinary was to be regarded as an answer to the equity suit, and as both parties subsequently filed amended pleadings, some of which seem informal, yet we have regarded them, as they were intended, as forming the true issues.

Wherefore, the judgment is affirmed.

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CASE 95—PETITION ORDINARY—APRIL 16.

Lewis vs. Williams.

APPEAL FROM TAYLOR CIRCUIT COURT.

1. As between themselves, *the drawer, acceptor, and indorser* of a bill of exchange, the true condition and responsibility of the parties, whether principals or sureties, may be explained by proof *aliunde*. (*Chitty on Bills*, 333–4.)
2. An accommodation drawer of a bill, for the use and benefit of the acceptor and indorser, may recover of the indorser or acceptor any amount he may have paid on said bill.
3. Exceptions to depositions having been once filed and acted on by the circuit court, it properly refused to permit exceptions for the same reasons to be again filed.

T. T. ALEXANDER and
A. J. JAMES, For Appellant,

CITED—

2 *Duvall*, 246; *Rice, &c., vs. Cravens.*
5 *Mon.*, 269; *Hunter vs. Gatewood.*
3 *Met.*, 247; *Finnell vs. Cox.*
2 *J. J. M.*, 28; *Thomas, &c., vs. Ferqueran.*
5 *Mon.*, 27; *Bank of Limestone vs. Penick.*

WM. HOWELL,
WM. H. CHELF, and
JOHN & JOHN W. RODMAN, For Appellee,

CITED—

Civil Code, secs. 651, 364 *to* 368, *and notes*, 653.
MSS. Opn., Oct., 1856; *Williams vs. Bettison.*
MSS. Opn., Dec., 1857; *Burren's ex'r vs. Wickliffe.*
2 *Met.*, 425; *Vandever vs. Griffith.*

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3 *Met.*, 37; *Russell vs. Monks.*
2 *Met.*, 558; *Litton vs. Young.*
3 *Met.*, 577; *Winston vs. Cox.*
2 *Met.*, 538.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted to review and reverse a judgment in favor of appellee against appellant, rendered on the 20th of September, 1866. Both of them were parties to a bill of exchange, of which appellee was the drawer, J. W. Wright the drawee and acceptor, and appellant the indorser.

Appellant insists that he, as indorser, is only surety on the bill for the drawer and acceptor, and as such, is responsible to the bank to whom he indorsed it; but as between themselves, the acceptor and drawer are responsible to him.

It is certainly true that the acceptor of a bill is primarily, and the drawer and indorser respectively, liable, in the order in which they stand on the bill; but it does not necessarily follow, that, because the acceptor is primarily liable, and the drawer liable before the indorser, that either or both were the original debtors, and the indorser only the surety for one or both of the others. The latter may have been the real debtor, and the others drawer and acceptor for his accommodation. The true condition and responsibility of the parties, as between themselves, whether principals or sureties, may be explained by proof *aliunde*. (*Chitty on Bills*, 333–4.)

Although appellant denies, in his answer to Williams' cross-petition, that he was the partner of Wright when the debt was contracted, and that it was not a partnership transaction, yet Fairman, who was an officer in the Branch Bank of Kentucky before and at the time the bill

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of exchange was drawn, proves that it was a renewal of a bill made by the same parties for the same amount, dated April 4, 1861, and that was the renewal of a bill for three thousand dollars, dated November 29, 1860, drawn and accepted by W. Lewis and J. W. Wright, and indorsed by D. M. Williams, which last was for the renewal of a note for four thousand dollars, dated April 19, 1860, on which J. W. Wright was principal, W. Lewis, D. M. Williams, and P. M. Smith were sureties; and out of the proceeds of that note a debt of one hundred and fifty-three dollars and eighty-one cents on J. W. Wright, principal, and W. Lewis, was paid, and the balance applied by Wright to payment of sundry debts.

Even if appellant and Wright were not partners when the debt was first contracted, one hundred and fifty-three dollars and eighty-one cents of the money then obtained were applied to the payment of a debt for which appellant was bound and appellee was not; and on the bill to renew or to take up the three thousand dollars of that debt unpaid, appellee was the indorser for appellant and Wright—which of the two last named was the acceptor does not appear, but if Wright was then the principal debtor, appellant was bound on that bill before appellee, and by becoming the drawer of the bill now in controversy, for the accommodation of Wright and appellant, appellee did not thereby assume, as between the parties, a greater or different responsibility than that which he was under by the preceding bill.

But it is contended that the court below refused to adjudicate as to the competency of Wright as a witness in behalf of appellee on exceptions filed by appellant to his deposition; and to that action of the court below he took an exception. A reference to the bill of exceptions will show that counsel have mistaken the question ruled by the court and excepted to.

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On the 20th of September, 1864, appellant "offered" to file exceptions to Wright's deposition, to the filing of which appellee objected; the court took time till the 22d of the same month to consider the motion, and on that day the motion was overruled, and appellant filed his bill of exceptions, setting forth the exceptions which he offered to file to said depositions, and then states defendant Williams objected to the filing of them, "and it appearing by the record that exceptions for the same reasons had been formerly filed *and acted on*, the court sustained the objections, and refused to permit *the filing of said exceptions*, to which opinion of the court the plaintiff excepts, and prays," &c. So it was evidently to the refusal of the court, to permit the exceptions to the deposition to be filed that appellant excepted, and not to the refusal of the court to decide upon the exceptions to the deposition; for exceptions, the same in substance, had been previously filed by appellant, "*and acted on*," and overruled, as we must presume, since the record does not show that the deposition was rejected, but has it inserted, and shows no bill of exceptions to the ruling of the court in regard to it.

The deposition of Wright must be considered as evidence in the case; and, although he does not give a very consistent account as to how the money was appropriated, still, he proves that the money was borrowed originally for the use of himself and appellant, who were partners in trade at the time, and was so used. That statement is not contradicted by any evidence, and we must, therefore, regard that relation as subsisting between them then, and, consequently, appellant was liable to appellee for whatever he may have paid on said debt.

Judgment affirmed.

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CASE 96—PETITION EQUITY—APRIL 16.

Shrock vs. Shrock.

APPEAL FROM KENTON CIRCUIT COURT.

1. A circuit court is authorized to decree a separation or divorce from bed and board for any such cause as it may, in its discretion, deem sufficient. This discretion is not arbitrary or unlimited, but a sound legal discretion, and only to be exercised for such causes as may be deemed sufficient when considered with a just and reasonable regard to the legal rights and obligations of both parties. (*Revised Statutes, sec.* 6, *art.* 3, *chap.* 47, 2 *Stanton*, 20.)
2. The allegations of the wife that her husband, "*in a fit of anger, drove her away, and told her to take her things and leave, which she did*," and other reprehensible conduct upon his part, as inducing causes of unhappy relations between them, resulting in her separation from him, were, by order of the court, *erroneously stricken out of her petition* for a divorce from bed and board and alimony. These allegations are held to be sufficient, if true, to entitle the plaintiff to the relief sought.
3. Although no legal cause of divorce exists, the right to a decree of separation and alimony, which the law afforded to the wife before the adoption of the Revised Statutes, are not impaired, but recognized by section 6, article 3, chapter 47, Revised Statutes (2 *Stanton*, 20).

J. F. & CHAS. H. FISK, For Appellant.

CARLISLE & O'HARA, For Appellee.

JUDGE HARDIN DELIVERED THE OPINION OF THE COURT:

In this suit, which was brought by the appellant against her husband for a decree of separation and for alimony, the plaintiff alleged in her petition, that shortly before the institution of her suit, the defendant, "*in a fit of*

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anger, drove her away, and told her to take her things and leave, which she did." She further alleged, as inducing causes of unhappy relations between herself and husband, and resulting in her separation from him, various facts, importing a charge of illicit intimacy between the defendant and a woman who had been an inmate of his house, and other reprehensible conduct on his part, particularly in upholding and taking part with said woman in quarrels with the plaintiff and her daughter, Miss Summers.

The court, on the motion of the defendant to strike surplus matter from the petition, directed a commissioner to strike out of the same "all the redundant and unnecessary matter, and all except the necessary allegations;" and this order, as executed, resulted in striking out most of the specific averments of the petition which we have referred to.

The defendant answered the remaining part of the petition, and, after a somewhat elaborate preparation, the cause was, on final hearing, dismissed, and from that judgment this appeal is prosecuted.

The relief sought by the plaintiff in this case does not necessarily depend on the existence of any of the causes for granting a *divorce* under the provisions of section 1 of article 3 of chapter 47 of the Revised Statutes; but the proceeding is governed by the 6th section of said article, which is as follows:

"Decree for separation or divorce from bed and board may also be rendered for any of the causes which allow divorce, or for such other cause as the court, in its discretion, may deem sufficient. Pending an application for any divorce, the court may allow the wife maintenance. Upon final decree of divorce from the bond of matrimony, the parties shall be restored such property,

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not disposed of at the commencement of suit, as either obtained from or through the other before or during the marriage in consideration or by reason thereof; and if the wife have not sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable."

Although a wife who abandons her husband without any reasonable cause, and of her own voluntary choice lives separate and apart from him, is not entitled to an allowance against him for her support, as was decided in the case of *Lee vs. Lee* (1 *Duvall*, 196), yet the husband, being bound to support and protect his wife, cannot relieve himself from this obligation by his own wrongful act; and if, by his improper conduct towards her, he drives her from his home, or by the impropriety of his conduct or deportment his house is rendered unfit for her residence, and she thereupon removes and lives apart from him, the law will hold him bound to maintain her as his wife, notwithstanding her constrained separation from him. (*Henderson vs. Stringer*, 2 *Dana*, 292; *Billing vs. Pilcher & Hauser*, 7 *B. Mon.*, 458; *Bright on Husband and Wife*, *vol.* 2, *page* 11.)

And although no legal cause of divorce may have existed in this case, the right of the appellant to a decree of separation and alimony, which the law would have afforded to her before the adoption of the Revised Statutes, is not impaired, but recognized by the section which we have quoted. The court is thereby authorized to adjudge a separation or divorce from bed and board for *any such cause as it may, in its discretion, deem sufficient.* Of course the discretion thus conferred is not to be understood as arbitrary or unlimited, but a sound, legal discretion, and only to be exercised for such causes as may be deemed sufficient, when consid-

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ered with a just and reasonable regard to the legal rights and obligations of both parties.

The plaintiff had a right to allege and prove, under our system of practice, the facts constituting her cause of action; and if the statements of her petition which were stricken out were alone, or in connection with the other allegations, sufficient, if true, to entitle her to the relief she sought, the court, in our opinion, erred in causing said statements to be stricken out.

We have but briefly referred to the statements of the petition which were stricken out. Without extending this opinion by a recital which is deemed unnecessary, it may suffice to say that we regard the facts alleged in the petition, as originally presented, if true, as sufficient to entitle the plaintiff to the relief which she sought.

It seems to us, therefore, that the order striking from the petition part of the allegations thereof was erroneous, and that the judgment should, therefore, be reversed.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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ACTION—

1. A surety's right of action against his principal does not accrue until he pays the debt.—*Hikes vs. Crawford & Long* ---------- 19

2. "*It is not so!*" "*It's not so—no such thing!*" These words being used by a party to a suit on trial before a justice of the peace, in reply to answers made by a witness who was being cross-examined by him, *are actionable.* As the words are susceptible of an innocent and an offensive meaning and understanding, their determination was properly left to the jury.—*Dedway vs. Powell* ---------- 77

3. *If the plaintiff or his attorney*, before judgment, either directly or indirectly, puts a party who is not liable for the debt sued on, off his guard, or prevents him from defending the action, such conduct would entitle the injured party to relief.—*Hayden, &c., vs. Moore*, 107

4. A suit may be maintained in behalf of a church congregation in reference to the church property, by the trustees of the church, or by a committee appointed for that purpose by the congregation.—*Humphrey, &c., vs. Burnside, &c.* ---------- 215

5. The right of a creditor of a decedent to sue his heirs or devisees in equity, is expressly conferred by the Revised Statutes. (*Sec.* 10, *chap.* 40.)—*Johnson, &c., vs. Belt* ---------- 405

6. Payment of a note extorted by military arrest being coerced by military duress, the law implied a promise to make restitution, and the assignor and assignee are jointly liable on that promise. Although they had no agency in extorting the note or coercing payment, each of them was apprised of the want of a valuable or legal consideration.—*Voiers and Parker vs. Stout* ---------- 572

ACT OF GOD—

1. The claimant of an attached horse, coming in as a third and unsued party, obtained possession of the horse, by giving bond and security as provided by section 235, Civil Code, that he would perform the judgment of the court, else have the horse forthcoming, subject to the order of the court. Judgment being rendered against the as-

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ACT OF GOD—Continued.

serted title of the claimant, he is liable on his bond, notwithstanding the death of the horse during the litigation, which was protracted by his wrongful assertion of title to the horse.—*Dear vs. Brannon*__ 471

AD QUOD DAMNUM—

1. A shanty, put up and occupied for the sole purpose of preventing the condemnation of a stone quarry, and not in good faith for a dwelling-house, will not entitle the owner to the exemption of quarries within two hundred yards of a dwelling-house, as provided in chapter 103 of the Revised Statutes. (2 *Stanton*, 436.) But to entitle the owner to this exemption, the house must have been erected for the sole purpose of being used as a dwelling-house, and for no other purpose, or converted, in good faith, into a dwelling-house.—*Morris vs. The Schallsville Branch of the Winchester and Red River T. P. R. Co.*_____ 448

ALIEN ENEMIES—

2. Alien enemies may sustain the relation of debtor and creditor. If the debt existed prior to the war, the right of action is suspended during hostilities, and revives with peace, unless the sovereign has intervened by way of confiscation; and even during the war, by the permit of the sovereign, this relation may be created, and it may be created by necessity without such license.—*Crutcher vs. Hord and wife* _____ 360

2. An alien enemy may be the devisee of real estate or the distributee or legatee of personalty; and if the government takes no proceedings of confiscation or sequestration, it will be no defense to his claim when such relation has ceased by the termination of the war. (*Fairfax vs. Hunter*, 7 *Cranch*, 626; *Attorney General vs. Wheeden, &c., Park's Rep.*, 267; *Beadwell vs. Weeks*, 1 *Johnson's Chancery Reports*, 206.)—*Ib.*_____ 360

3. In a proceeding to subject real estate situated in Kentucky belonging to enemies resident in the Confederate States during the war, the creditor being a citizen of, and the land situated in, Kentucky, so far from its sale being interdicted, the rights of the legal creditor are protected even against the government on a proceeding to confiscate, by section 47 of the act of Congress of March 3, 1863. (2 *Brightly's Digest*, 1238.)—*Ib.* _____ 360

4. Any one not under legal disabilities had the right to purchase the real estate situated in Kentucky of debtors who were resident in the Confederate States, at decretal sales thereof during the war, either for

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ALIEN ENEMIES—Continued.

his own or for the debtor's benefit, subject, as was all the property of the rebel debtor, to confiscation by the government; but not subject to be defeated in this or any other right, by any one except the sovereign.—*Ib.* ---------- 360

5. Legal rights and responsibilities might spring out of the conduct of the purchaser of such real estate, which, however, would remain suspended during hostilities; but on the restoration of peace, the debtor's right of action would revive, and he could enforce any legal right which existed anterior to, or was created during, the war. *Ib.* ---------- 360

APPEALS—

1. *Motion for a new trial in the circuit court is essential in an action wherein the issue presented by the pleadings was submitted to a jury.* The failure to make such motion precludes the appellant from the opportunity of having the errors complained of corrected in the Court of Appeals. (*Humphreys vs. Walton*, 2 *Bush*, 580.)—*Detherage vs. Montgomery* ---------- 46

2. A motion for a new trial is not indispensably necessary to give the Court of Appeals jurisdiction of an appeal taken from a judgment in an ordinary action, in which *both law and facts were submitted to the judge, the authenticated bill of exceptions purporting to recite all the evidence on the trial.* An intimation to the contrary in *Humphreys vs. Walton* (2 *Bush*, 580), was *obiter*, and is not regarded as authoritative or right, if it could, as we think it ought not to be understood as intending more, than that, unless such motion be made within a prescribed time, the court would not be bound to hear it or sign any bill of exceptions so as to bring the case to this court.—*Union Insurance Company of Louisville vs. Groom* ---------- 289

3. On an appeal from the judgment of a judge in an action wherein both law and facts were submitted to him, the Court of Appeals will consider the judgment of the judge just as it would the verdict of a jury for whom he was substituted by the parties.—*Ib.* ---------- 289

4. Infants and defendants constructively summoned within the times prescribed by law, are allowed, by law, alternate remedies to retry the cause. *First.* By proper proceedings in the court below; *Second.* By appeal to the Court of Appeals; but they are not allowed to proceed by both remedies, and in the two courts, at the same time. (*Salter vs. Dunn*, 1 *Bush*, 311.)—*Speak, &c., vs. Mattingly, &c.* 310

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Appeals.

APPEALS—Continued.

5. After arriving at the age of twenty-one years, the defendant prosecuted an appeal to the Court of Appeals, to reverse a judgment of the circuit court, *rendered against her during her infancy. The Court of Appeals affirmed that judgment. As to any matter which was, or could have been heard on the appeal, the judgment of affirmance, is a good plea in bar to a petition filed in the circuit court*, to vacate or set aside the decree appealed from, whether the petition in the circuit court was filed before or after the appeal was taken.—*Ib.* 310

6. No appeal can be entertained to correct a clerical misprision, until a motion is made in the court below for that purpose. (*Dodd vs. Combs*, 3 *Met.*, 29.)—*Long vs. Gaines, Berry & Co.* 353

7. "Executed by delivering a true copy to John Long." On judgment by default, the Court of Appeals cannot presume that there were other John Longs in the county than the defendant. One John Long was the defendant; the writ was served on one John Long, and when he puts in no defense, this court will presume he was the identical John Long sued.—*Ib.* 353

8. An order appointing a commissioner to ascertain facts in reference to alleged usury, in controversy in the suit, is not such a final judgment as will authorize an appeal.—*Pryor, assignee, &c., vs. Smith, &c.* .. 379

9. A judgment on demurrer, dismissing plaintiff's petition, is virtually a judgment against cause of action, and must be considered a final judgment, and an appeal may be taken to reverse it.—*Commonwealth for Young vs. Peters* 403

10. A document styled a bill of exceptions, professing to state the facts, which may have been actually exhibited in the circuit court, and which does not appear to have been either signed or filed in court, cannot be judicially noticed or considered by the Court of Appeals. *Corley's ex'r vs. Evans and wife* 409

11. Time being allowed by the circuit court to complete a bill of exceptions in vacation, the presumption is, that it was signed extra-judicially, out of court, and is, therefore, according to the Code, unauthorized and void.—*Ib.* 409

12. In the absence of testimony to the contrary, the Court of Appeals must presume, that the verdict was authorized by the proof, and the judgment of the circuit court, consequently, right.—*Ib.* 409

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APPEALS—Continued.

13. Although an interlocutory order merely dissolving an injunction, is not a final decree, revisable by the Court of Appeals, yet a judgment for damages on the dissolution, is final, and may be enforced by execution *pendente lite;* consequently, when the amount of damages will authorize an appeal, the Court of Appeals has jurisdiction alone to correct it.—*Offut's ex'x vs. Bradford, &c.* ---------- 413

14. An order of the court for a rule against the surety in a bond to "*perform the judgment of the court*" discharging an attachment levied on a steamboat, to show cause why he should not be compelled to perform the judgment of the court in the action, *is not a final order on which an appeal may be taken* to the Court of Appeals. Such appeal is dismissed for want of jurisdiction.—*Ib.* ---------- 445

15. The plaintiff might sue on the appeal bond without issuing an execution on his judgment against the defendant—the plaintiff having recovered a judgment in the circuit court, on the defendant's appeal from the judgment of the quarterly court; but—*Dills vs. Cecil* -- 579

16. When the plaintiff issues an execution against the defendant, a resulting lien on defendant's property inures to his surety in the appeal bond, by subrogation. If that lien is discharged by the plaintiff, such discharge will exonerate the surety in the appeal bond, and is a good defense in a suit thereon.—*Ib.* ---------- 579

17. Exceptions to depositions are deemed to have been waived when the record does not show they were acted upon by the circuit court.—*Patterson, &c., vs. Hansel, &c.* ---------- 654

ASSIGNOR AND ASSIGNEE—

1. The obligee in a note, long after it was executed to him, assigned it to a third party, and wrote his name under the name of the obligor. The circumstances conduce to show that the assignor intended to sign the note as guarantor. The inadvertent mislocation of his name did not make the note legally void, and the assignee might maintain his action on it against the sole obligor.—*Cason vs. Wallace* ---- 388

2. An assignee of a note has a right to sue the obligor, only on the note; but he has no cause of action, against him, on the original consideration.—*Ib.* ---------- 388

3. A contract to pay a stipulated sum of money, for the rent of a house and lot, and also to make certain improvements therein specified, *is not assignable in law so as to vest the assignee with a right to sue in his*

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ASSIGNOR AND ASSIGNEE—Continued.

own name alone. The assignor is a necessary party plaintiff or defendant. (*Sec.* 6, *chap.* 22, *Revised Statutes*, 1 *Stant.*, 268; *Marcum, &c., vs. Hereford*, 8 *Dana*, 1.) The assignee being the equitable holder, the assignor still holding the legal title, each is an essential party. (*Gill vs. Johnson*, 1 *Met.*, 449; *Lytle vs. Lytle*, 2 *Met.*, 127.)—*Hicks & Gill vs. Doty* 420

4. By the husband's assignment of his wife's legacy, the assignee took the husband's right, and acquired no more. That right was contingent, and depended on the reduction of the legacy to possession during the husband's life. As the legacy, payable in five years, was not due and demandable at the time of the husband's death, there was no such reduction, nor could have been, unless the executor had anticipated the time of payment prescribed by the testator, which he rightfully refused to do.—*Dunn vs. Lancaster* 581

ATTACHMENTS—

1. Allowances made by county courts to jailers for fees and services as such, cannot be attached in the hands of the sheriff.—*Webb vs. McCauley* 8

2. Fees and allowances to jailers being necessary, and provided by law, to enable them to discharge their official duties, public policy will not permit a creditor to attach these fees and allowances, in the hands of the sheriff.—*Ib.* 8

3. If there be a cause of attachment *against one co-defendant*, under section 221 of the Civil Code, *save for non-residency*, an attachment is allowed against the other defendants. The court refused to overrule *Mills vs. Brown, &c.*, 2 *Met.*, 405.—*Duncan vs. Headley* 45

4. Sundry attachment suits against the same defendant, on motion of the parties, without being consolidated, being heard and tried together by the court, the plaintiffs in some of the actions are competent witnesses for other plaintiffs. In a jury trial such evidence would, perhaps, be misleading, but not so on a trial by the court.—*Jarboe, &c., vs. Coivin, &c.* 70

5. A surety who is secured by mortgage on real estate has no right to sue out an attachment against his principal, without alleging the insufficiency of the mortgage; but being induced to sue out the attachment by the defendant, whilst other creditors might do so, the defendant himself, cannot be heard to object and defeat such attachment, for this cause.—*Ib.* 70

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ATTACHMENTS—Continued.

6. A citizen of Ohio made to another citizen of that State a voluntary deed, assigning all his estate, debts, &c., everywhere, for the payment of all his own debts, without discrimination or preference, according to the laws of Ohio regulating assignments by "*insolvent debtors.*" After the date of the assignment, Kentucky creditors, in the courts of Kentucky, attached a debt due by a citizen of Kentucky to the non-resident insolvent. The attaching creditors never acceded to the assignment. *Held*—That in the courts of Kentucky the attachment liens have preference over the title and claim of the assignee.—*Johnson vs. Parker, &c.* ---------- 149

7. *Resident creditors*, having attached a debt due by a citizen of Kentucky to an insolvent debtor of Ohio, *have preference* in the courts of Kentucky over the assignee of such insolvent debtor, although the assignment was made in Ohio before the attachments were sued out in Kentucky.—*Ib.* ---------- 149

8. The principle of comity does not require the courts of one State, to recognize and enforce, to the prejudice of its own citizens, assignments made by insolvent debtors under the laws of another State; but they will secure justice to domestic creditors, without regard to the foreign law and assignment.—*Ib.* ---------- 149

9. In an action on an attachment bond to recover expenditures in getting counsel, evidence, and for trouble, &c., all these expenses having been incurred in defending the cause of action, the plaintiff was not entitled to recover anything.—*Johnson vs. Farmers' Bank of Kentucky*, 283

10. In an action on an attachment bond to recover expenses, &c., such expenses, and such only, as were incurred in defending the attachment, can be recovered. If part of the expenses, &c., were incurred in defending the attachment, that part may be recovered.—*Ib.* ---------- 283

11. In an action for a malicious suit and attachment, probable cause not being made out, the plaintiff is entitled to recover damages, commensurate with the injury.—*Ib.* ---------- 283

12. Shippers of cotton from Memphis, Tenn., to Boston, Mass., drew drafts upon their consignees, and discounted them in bank at Memphis, by pledging the cotton, by a delivery of the bills of lading therefor; the cotton was subsequently attached *in transitu* at Louisville, Ky., by creditors of the shippers. *Held*—That the bank had a lien which had preference over the attachment liens.—*Petitt & Co. vs. First National Bank of Memphis* ---------- 334

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Attachments.

ATTACHMENTS—Continued.

13. A garnishee, being called on in plaintiff's petition *to answer and say what amount he is indebted to his co-defendant* against whom the plaintiff had a return of "*no property*," the garnishee being served with a summons, and failing to answer, the petition is taken for confessed; and, on his allegation of indebtedness in a specified sum, the plaintiff is entitled to judgment for that amount against the garnishee. (*Civil Code, secs.* 248, 474.)—*Bowen vs. Emmerson, &c.*.. 345

14. In an action in equity in the Livingston circuit court against the steamboat Hyatt and owner, on a note given by him at Evansville, Indiana, for boilers furnished his boat and repairs of its engine, on a special contract made by the owner, *the boat being attached*, the circuit court properly rendered a personal judgment against the defendant, and also for enforcing the asserted lien on his boat.—*Steamboat Hyatt, &c., vs. Reitz & Haney*..... 395

15. When an attachment has been levied, and the defendant has executed bond, with security, that he "*shall perform the judgment of the court*," as authorized by the Civil Code, sections, 242, 243, the attachment is discharged by operation of law, and the obligors in the bond are bound unconditionally to perform the judgment of the court in the action, and the sufficiency of the grounds for obtaining the attachment cannot thereafter be inquired into. (*Hazelrigg vs. Donaldson*, 2 *Met.*, 445.)—*Inman & Carr vs. Strattan & Snodgrass*..... 445

16. The claimant of an attached horse, coming in as a third and unsued party, obtained possession of the horse by giving bond and security as provided by section 235, Civil Code, that he would perform the judgment of the court, else have the horse forthcoming, subject to the order of the court. Judgment being rendered against the asserted title of the claimant, he is liable on his bond, notwithstanding the death of the horse during the litigation, which was protracted by his wrongful assertion of title to the horse.—*Dear vs. Brannon*.. 471

17. A third party claimant of attached property, who asserts an unfounded claim and gets possession by executing bond, as provided in the Code, is to be regarded, as a bailee in his own wrong, liable for all accidents and hazards.—*Ib.*..... 471

18. There is a distinction between bonds rightfully given to retain possession of the property until the litigation is ended and bonds given wrongfully to get a possession the party is not legally entitled to. (*See opinion for a statement and review of cases bearing on these questions.*)—*Ib.*..... 471

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ATTACHMENTS—Continued.

19. Summons issued on the 21*st day of May*, 1866, *returnable* to the first day of the *ensuing June term*. An order of attachment issued in the same action was dated *May* 21, 1866, returnable on the first day of the next term of the circuit court, and duly signed and attested by the clerk. This order of attachment was indorsed on its back, unattested, "*November term*, 1866." On the 10*th day of August*, 1866, the sheriff levied this order of attachment on land. On the 25*th day of August*, 1866, the owner mortgaged this same land. In a controversy between the attaching creditor and mortgagees, the court held that the *mortgagees had, but that the attacking* creditor, did not have, a lien on the land.—*Peters, gd'n, &c., vs. Conway* 565

20. The indorsement of a levy on land, on an attachment after the return day thereof, as shown upon the face of the writ, is invalid, and no lien is created on the land by such indorsement.—*Ib.* 565

21. If, by mistake of the clerk, an attachment was dated May 21, 1866, when it ought to have been dated in June, 1866, and, in consequence of such mistake, the attachment, upon its face, was returnable in June, instead of November, 1866—a levy on land being indorsed on such attachment August 10, 1866—if, on motion, the mistake was shown and corrected as a clerical misprision, this would simply prove that it was legally no attachment, and no authority to the sheriff to levy it, as the return day must be tested by the date of issual, appearing on the face of the writ.—*Ib.* 565

22. Subsequent attaching creditors can show defects in prior attachments, and thereby get the prior liens out of their way; and the same principle authorizes subsequent mortgagees to attack prior attachments and levies.—*Ib.* 565

23. *Two grounds in the alternative* for an attachment—"*that the defendant has left the county of his residence to avoid the service of a summons, or so conceals himself that a summons cannot be served on him*"—are deemed sufficient, and attachment sustained. (*Wood vs. Wells, &c.*, 2 *Bush*, 197.)

See opinion for a review of evidence showing its sufficiency to sustain attachment on the above grounds.—*Hardy, &c., vs. Trabue, Davis, &c.* 644

ATTORNEYS—

1. Attorneys have a lien upon claims in their hands for collection, both before and after judgment, for reasonable compensation for services, whether the amount of the fee has been agreed by the parties or not. (*Act of January* 26, 1866, *Myers' Supplement*, 685.)—*Stephens & Hermes vs. Farrar Brothers* 13

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ATTORNEYS—Continued.

2. The institution and prosecution of a suit to judgment by the plaintiffs' attorney, as such, is sufficient notice to the judgment defendant that the plaintiffs' attorney has a lien upon the judgment for reasonable compensation for services.—*Ib.* ---------- 13

3. When the defendant has reasonable notice of the attorney's claim and lien, the lien of plaintiffs' attorney on the judgment, for a reasonable fee, as agreed by the parties, or adjudged by the court, cannot be defeated by the defendants paying or satisfying the judgment in full to the plaintiff in person, and taking his receipt in full satisfaction thereof.—*Ib.* ---------- 13

4. After the plaintiffs' attorneys had obtained judgment, on their motion the court ordered "that the clerk shall indorse on the execution which issues herein that the sheriff shall collect seventy dollars, which is allowed to said attorneys as a reasonable fee for their services, together with the costs of this suit." The execution defendants, by payment to the plaintiffs, obtained a receipt in full, upon the presentation of which to the sheriff he returned the execution satisfied. On motion of the attorneys, the sheriff's return was quashed. *Ib.* ---------- 13

BAIL AND BAIL BONDS—

1. An order of the court abating an indictment on motion of the Attorney for the Commonwealth, although superinduced by the mistaken belief that the defendant was dead, was a termination of the prosecution on said indictment, and it could not be reinstated on the docket as a pending indictment against such defendant. Such indictment having been reinstated on the docket, there was no prosecution pending against the defendant. Being arrested, the defendant was not legally in custody, charged with a public offense; and having given a bail bond, his sureties are not liable for his non-appearance.—*Henry vs. Commonwealth* ---------- 427

2. It is essential to the validity of a recognizance or bail bond that it may be made to appear that the defendant was, when recognized or bailed, legally in custody, charged with a public offense, and was discharged therefrom by reason of the giving of the bond or recognizance, and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for an examination of the charge, or before a court for the trial thereof. (*Criminal Code, sec.* 80.)—*Ib.* ---------- 427

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BAIL AND BAIL BONDS—Continued.

3. A recognizance or bail bond is defective for the reason that it cannot be ascertained from it, that the bail undertook, that the defendant should either appear before a magistrate for examination of any charge, or before the court for trial thereon.—*Ib.* 427

BAILMENTS—

1. Commission merchants are required to sell property consigned to them for sale, within a reasonable time after its receipt, unless otherwise instructed.—*Atkinson & Co. vs. Burton* 299

2. Property consigned to commission merchants for sale is accompanied with a general direction to sell, when no other instructions are given. *Ib.* 299

3. Commission merchants in New York, for failing to sell tobacco consigned to them for sale within a reasonable time after its receipt, are liable for its value. Having held the tobacco much longer than a reasonable time for its sale, and until it had depreciated in price, they are held responsible for its value, as if converted, or appropriated to their use, at the expiration of five months after its receipt, which, in this case, is held to have been a reasonable time for selling. *Ib.* 299

4. The hirer of a slave for a term which had not expired on the 18th day of December, 1865, when the Constitutional Amendment abolishing slavery was declared adopted, is entitled to an abatement, *pro tanto*, of the promised price.—*Mundy vs. Robinson* 342

5. Hiring implies a warranty of title; consequently, should the title fail from any legal cause, by either an eviction by superior title, or authorized act of the government, then there is so far, a failure of consideration, and the bailee or hirer will be entitled to a *pro tanto* abatement.—*Ib.* 342

6. A third party claimant of attached property, who asserts an unfounded claim and gets possession by executing bond, as provided in the Code, is to be regarded as a bailee in his own wrong, liable for all accidents and hazards.—*Dear vs. Brannon* 471

7. A mare was borrowed to ride about three miles, and instead of doing so, the borrower put her in a buggy and drove her twelve or fourteen miles, where she was watered, put in a stable and fed, without any attention or care on the part of the borrower. The mare was found dead next morning in the stable. The owner recovered a judgment in the circuit court for the value of the mare. That judgment

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BAILMENTS—Continued.

is affirmed. See the opinion for a review of the law, facts, and instructions given and refused in the circuit court.—*Kennedy vs. Ashcraft* 530

8. A borrower is liable for any neglect whatever in care and use. He is bound to extraordinary diligence, and is responsible for slight neglect. (*Story on Bailments, secs.* 237, 239.) He ought to exert all possible care, such as the most careful apply to their own affairs; and he is liable not only for slight, but for *the slightest fault.* (*Pothier.*) *Ib.* 530

9. The borrower of a mare to ride about three miles, instead of doing so, became a bailee in his own wrong by putting her in a buggy and driving her twelve or fourteen miles. The mare having died whilst thus in possession of the bailee in his own wrong, he is liable for her value, unless he makes it clearly appear that the loss resulted inevitably from causes disconnected with the improper use and bailment. *Ib.* 530

10. Whether the relation between the illegal act and the damage sustained was sufficiently proximate to create a liability on the part of the wrong-doer, and to sustain the action, "*has been treated as a question of law, to be decided by the court,* and not as a question, to be determined by the jury after, determining the facts by which the relation is demonstrated."—*Ib.* 530

BASTARDY—

1. The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy, and in the absence of evidence to the contrary, a child *eo nomine* is therefore legitimate. (2 *Hogg C. R.*, 197; 4 *Eng. Eccl. R.;* 13 *Ves.*, 145; 23 *N. Y.*, 107.)—*Dannelli, &c., vs. Dannelli's adm'r* 51

2. The presumption of legitimacy is not lightly repelled by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory, and conclusive.—*Ib.* 51

3. By the laws of Kentucky actual marriage and subsequent recognition would legitimate a child born before the marriage.—*Ib.* 51

BETTING AND GAMING—

1. Money advanced or loaned, to be bet or wagered on a horse race, cannot be recovered. The Revised Statutes provide that all such contracts and considerations "*shall be void.*" (*Rev. Stat., chap.* 42, *sec.* 1.) *Alfriend, &c., vs. Hughes* 40

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BETTING AND GAMING—Continued.

2. Under the general issue, the circuit court properly allowed and considered the special finding of the jury, to the effect, that the action was based upon a gambling transaction.—*Ib.* 40

3. The plaintiff is entitled to notice of every defense intended to be relied on, consisting of "new matter constituting a defense," by a statement of such matter in the answer. This rule does not apply to a case like this, in which, from the plaintiff's own proof of the contract, he seeks to enforce, the contract is shown to be, according to express law, absolutely void.—*Ib.* 40

4. Todd sold and delivered a horse in 1860 to Caplinger for $225, to be paid when Bell and Everett should carry the electoral vote of Kentucky. Bell and Everett then being candidates, did carry the electoral vote of Kentucky. Todd sued on the obligation, and also alleged an implied assumpsit to pay a reasonable price for the horse within a reasonable time. *Held*—That the contract was a bet on an election, and forbidden by law, and that, *as the law would not enforce the express contract, it would not imply one that could be enforced* for such a vicious and unlawful consideration. (*Commonwealth vs. Shouse*, 16 *B. Mon.*, 328.)—*Todd vs. Caplinger* 139

5. When the loser receives the thing bet, as the horse in this case, it is not forfeited to the Commonwealth. The act of March 6, 1854 (1 *Stanton*, 568), *section* 1, provides, that "*if the person winning, shall receive the sum of money or other thing so bet*," * * * it "*shall be forfeited to the Commonwealth.*"—*Ib.* 139

6. When a party deliberately enters into a contract or transaction forbidden by law, he cannot recover upon the express contract, nor will the law imply one for him.—*Ib.* 139

BILL OF EXCEPTIONS—

1. A document styled a bill of exceptions, professing to state the facts, which may have been actually exhibited in the circuit court, and which does not appear to have been either signed or filed in court, cannot be judicially noticed or considered by the Court of Appeals.—*Corley's ex'r vs. Evans and wife* 409

2. Time being allowed by the circuit court to complete a bill of exceptions in vacation, the presumption is, that it was signed extra-judicially, out of court, and is, therefore, according to the Code, unauthorized and void.—*Ib.* 409

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BILL OF EXCEPTIONS—Continued.

3. In the absence of testimony to the contrary, the Court of Appeals must presume, that the verdict was authorized by the proof, and the judgment of the circuit court, consequently, right.—*Ib.*..... 409

BILLS OF EXCHANGE—

1. Commercial paper, which was made in New Orleans, Louisiana, before the war commenced; matured, was payable, and protested for non-payment in that city after the war became flagrant in 1861. The maker and first indorser were residents of Louisiana; the last indorser was a resident of Kentucky. The paper was held and protested by a bank in New Orleans, although it, at that time, belonged to a bank in Kentucky. *Held*—That in order to make the Kentucky indorser responsible, it was essential that he should have been notified of the protest, at the earliest reasonable practicable moment, after mail communications were re-established from New Orleans after the raising of the blockade of that place in 1862.—*Morgan, &c., vs. Bank of Louisville*..... 82

2. Indorsers, resident in the jurisdiction of one belligerent, of commercial paper which matures, is payable, and protested for non-payment in the jurisdiction of the other, whilst the war is flagrant, are entitled to notice of the protest at the earliest reasonable practicable moment, after mail communications are re-established. If such notice is not given, such indorsers are exonerated from liability.—*Ib.*... 82

3. Promissory notes made negotiable and payable at a bank in the State of Ohio, by the laws of that State, have the legal character of bills of exchange.—*Carlisle, &c., vs. Chambers*..... 268

4. Promissory notes made negotiable and payable at a bank in Kentucky, if negotiated by a bank chartered by Kentucky, have the legal character of bills of exchange; but if not so negotiated, they are simple promissory notes only.—*Ib.*..... 268

5. When the law of the place of payment (*lex loci solutionis*) makes negotiable notes, bills of exchange, the universal law of comity requires their recognition as such, between the original parties.—*Ib.*..... 268

6. A negotiable note, being a bill of exchange in the State where it is made and executed, being indorsed in another State where it is by law a simple promissory note, by one citizen to another citizen of such State, such indorsement implied only an assignment of a simple promissory note. The citizens of the latter State should be presumed to have ascribed to the note the character stamped on it by their local law.—*Ib.*..... 268

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BILLS OF EXCHANGE—Continued.

7. A promissory note made negotiable and payable at a bank in Ohio, passed in that State to a citizen of Kentucky, who afterwards, in Kentucky, indorsed it to another citizen thereof. This note was not negotiated in a Kentucky bank. The indorsement was made, intended, and treated as an assignment of the note. The indorser is responsible only as assignor of the note, and not as an indorser of a bill of exchange. The law of Kentucky regulates the distinct contract of indorsement and the liability of the indorser.—*Ib.* 268

8. As to all who became parties to such bills in Ohio, knowledge of the law of that State will be presumed. Any presumption that the parties understood the true character of the thing contracted about, may be repelled by extraneous proof that they understood it to be a promissory note, the indorsement of which they expected to operate as an assignment.—*Ib.* 268

9. The assignor of a note executed to his assignee a mortgage *providing that said assignor and the obligors in said note shall cause the same to be paid at maturity, &c.* This mortgage is not a constructive guarantee of payment upon the part of the mortgagor alone; but a security, that if the assignee should, after proceeding with due diligence, fail to obtain payment from the obligors in the note, the mortgage would assure full payment by the mortgagor on his ultimate liability as assignor.—*Ib.* 268

10. *Notice of dishonor*, to an indorser of a bill of exchange, according to the current of American authorities, if left at his place of abode or business, with any one who may reside there, or be a member of his family, of sufficient age and discretion to take care of it, *should be regarded as a delivery to the indorser;* or, if it is not shown that any person was then within the premises, the leaving of the notice at such place would be so regarded.—*Bank of Ky. vs. Duncan* 294

11. A memorandum made by a clerk in a bank was read without objection after his death as evidence in this case, showing that he had delivered a notice of protest at the residence of the indorser, by leaving it with his daughter. It is not decided whether said memorandum ought to have been admitted as evidence or not, if it had been objected to.—*Ib.* 294

12. Ordinarily the relative rights and responsibilities of the parties to a bill of exchange is determined by their attitude upon the bill (*Hixon vs. Reed*, 2 *Littell*, 175; *Eldridge vs. Duncan*, 1 *B. Mon.*, 101); but—*Denton vs. Lytle, &c.* 597

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BILLS OF EXCHANGE—Continued.

13. Although, as a general rule, even when the bill is accommodation paper, the drawer stands bound before an indorser; as between themselves, the legal liabilities of the parties, arising from their relative positions on the bill, may be changed, by an agreement between them. (*Scott vs. Doneghy*, 17 *B. Mon.*, 321.)—*Ib.* 597

14. The accommodation drawer and indorser each paid one half of the bill, on the basis of equal responsibilities as between themselves, as sureties of the acceptors; this fact, if unexplained, authorizes the inference, that they acted in pursuance of some previous understanding or agreement rendering it obligatory on them both to do so. In this case the indorser sued the drawer, but did not recover the amount paid by him as above.—*Ib.* 597

15. To a bill of exchange, accepted by one partner *in the name of the firm*, the name of the drawer and indorser was forged. This bill was sold to a bank by the partner who accepted it, and the proceeds thereof drawn by him in the firm name, by an indorsement thereof on the forged check of the drawer and indorser. Notwithstanding the forgeries, the bill having been uttered by one partner, and the proceeds thereof having been received by him *in the firm name*, each partner is liable to the bank for the amount of the bill, the officers of the bank having no knowledge of the forgeries at the time of the purchase of the bill and the payment of the money.—*Burgess vs. Northern Bank of Kentucky* 600

16. If one of the parties to a bill negotiate it with a forged indorsement, in the name of the payee, he must be understood, as affirming, that the indorsement, is in the handwriting of the payee, or written by his order, and is estopped from denying the genuineness of the indorsement, or setting up the forgery, in defense of an action by the holder. (*Story on Bills*, *sec.* 225; *Hartsman vs. Henshaw*, *&c.*, 11 *Howard*, 177.)—*Ib.* 600

17. As between themselves, *the drawer*, *acceptor*, *and indorser* of a bill of exchange, the true condition and responsibility of the parties, whether principals or sureties, may be explained by proof *aliunde*. (*Chitty on Bills*, 333-4.)—*Lewis vs. Williams* 678

18. An accommodation drawer of a bill, for the use and benefit of the acceptor and indorser, may recover of the indorser, or acceptor any amount he may have paid on said bill.—*Ib.* 678

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BILLS OF LADING—

1. Property *in transitu* may be pledged by the delivery of bills of lading therefor. Such delivery of the bills of lading is considered as a constructive or symbolical delivery of the property. A lien is created by such a pledge and delivery.—*Petitt & Co. vs. First National Bank of Memphis* ---------- 334

2. Shippers of cotton from Memphis, Tennessee, to Boston, Massachusetts, drew drafts upon their consignees, and discounted them in bank at Memphis, by pledging the cotton, by a delivery of the bills of lading therefor; the cotton was subsequently attached *in transitu* at Louisville, Kentucky, by creditors of the shippers. *Held*—That the bank had a lien which had preference over the attachment liens.—*Ib.*_ 334

BONDS—

1. The bond of an administrator executed in a Kentucky county court in 1847, is not void, because all the obligors therein were residents of Virginia. As there was no law prohibiting it, the court will not adjudge it illegal.—*Rutherford's heirs vs. Clark's heirs*_ ---------- 27

2. On a motion for judgment on a bond suspending a sale of property levied on, to satisfy an execution under section 713 of the Civil Code, in determining its sufficiency, *the notice* should be considered in connection with the bond.—*Smith vs. Wells' adm'x* ---------- 92

3. A judgment for damages is erroneous in ordering the payment of damages by reference to the bond—"*and also the ten per cent. in damages, as agreed to, in the bond herein*"—without ascertaining any specific sum to be recovered.—*Ib.* ---------- 92

4. In an action on an attachment bond to recover expenditures, in getting counsel, evidence, and for trouble, &c., all these expenses having been incurred in defending the cause of action, the plaintiff was not entitled to recover anything.—*Johnson vs. Farmers' Bank of Kentucky*, 283

5. When a sale of personal property, upon which an execution is levied, has been suspended, by persons not defendants in the execution, as provided by section 713 of the Civil Code, any equitable cause can be shown against judgment on such bond, in whole, or any part thereof.— *Williams vs. Smith* ---------- 540

6. A third party, executing a forthcoming bond for property levied on, reciting, "it being the property of" the execution defendant, cannot, without proof of fraud or mistake, assert ownership and claim to such property, by executing a claimant's bond, and thereby prevent judgment against him on his forthcoming bond.—*Sparks vs. Shropshire*, 550

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BONDS—Continued.

7. The plaintiff might sue on the appeal bond without issuing an execution on his judgment against the defendant—the plaintiff having recovered a judgment in the circuit court, on the defendant's appeal from the judgment of the quarterly court; but—*Dills vs. Cecil*.. 579

8. When the plaintiff issues an execution against the defendant, a resulting lien on defendant's property inures to his surety in the appeal bond, by subrogation. If that lien is discharged by the plaintiff, such discharge will exonerate the surety in the appeal bond, and is a good defense in a suit thereon.—*Ib*..... 579

See OFFICIAL BONDS, *post*.

CHURCHES AND CHURCH PROPERTY—

1. In the division of the Methodist Episcopal Church of the United States in 1844, the local societies and church property in Kentucky passed to the Methodist Episcopal Church, South, except those churches and societies bordering on the Ohio river, which were permitted to determine the question whether they would go North or South, by a vote of the respective societies.—*Humphrey, &c., vs. Burnside, &c*..... 215

2. The plan of the separation of the Methodist Episcopal Church of the United States in 1844; that the separation was authoritatively consummated; and that the Southern conferences assumed an independent organization, under the name of the General Conference of the Methodist Episcopal Church, South; must now, be regarded as adjudged questions.—*Ib*..... 215

3. A suit may be maintained in behalf of a church congregation in reference to the church property, by the trustees of the church, or by a committee appointed for that purpose by the congregation.—*Ib*.. 215

4. By seceding from the Methodist Episcopal Church, South, the majority of the members of the Centre Street African Church, in Louisville, thus seceding, forfeited their right to the church property, and those, although a minority, who remained members of the Church, South, are the only rightful beneficiaries of said church property, and are entitled to its exclusive use.—*Lewis, &c., vs. Watson, &c*..... 228

5. The title to the three parcels of the lot on which Centre Street African Church in the city of Louisville was erected, by deeds made in 1832 and 1845, and an executory contract in 1854, was vested in the white trustees, and their successors of the Fourth, now the Fifth Street Methodist Episcopal Church, South, in said city, for the sole use of the colored members of the Centre Street branch of that church. If

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CHURCHES AND CHURCH PROPERTY—Continued.

all the colored members of said Centre Street Church had seceded and joined the Church North, they could not have taken the property with them, but would have left it, as dedicated, to the use and control of the Methodist Episcopal Church, South.—*Ib.* 228

6. It was fatally erroneous in the circuit court to adjudge a conveyance of an acre of land "*for church purposes, and for school purposes,*" when, in the writing on which the suit for the conveyance was based, the defendant agreed to make a voluntary dedication and conveyance, *for church purposes only.—McDaniel vs. Watson, &c.* 234

7. If the congregation to whose uses the defendant agreed, in writing, to make a *voluntary dedication* and conveyance of one acre of land, on which the congregation erected a church building, had ceased to use and occupy the same, for the purposes for which the dedication was made, as it would revert, if it had been conveyed, if such uses had failed before conveyance, *a fortiori*, the defendant would be under no obligation to convey.—*Ib.* 234

8. To entitle the plaintiffs, trustees of the church, to whose uses the defendant had agreed, in writing, to make a voluntary dedication and conveyance of one acre of land, on which the congregation erected a church building, to a judgment for the conveyance thereof, they ought to have alleged in their petition that the congregation had used and occupied the church, and intended, in good faith, to continue to use and occupy the same for the purposes intended. Failing to make these allegations, the demurrer to the petition should have been sustained.—*Ib.* 234

CLERICAL MISPRISION—

1. A failure to mention in the judgment, credits which are shown in the petition, is a clerical misprision, because the judgment could be amended by the record.—*Long vs. Gaines, Berry & Co.* 353

2. No appeal can be entertained to correct a clerical misprision, until a motion is made in the court below for that purpose. (*Dodd vs. Combs*, 3 *Met.*, 29.)—*Ib.* 353

CLERKS—

1. Clerks of courts cannot, by contract, charge for making out copies or transcripts of records in their offices more than the fees allowed by law. Public policy will not permit such contracts.—*Bates, &c., vs. Foree, &c.* 430

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CLERKS—Continued.

2. A clerk of a court will not be compelled to surrender a transcript of a record, which was partly made out before and completed by him after the expiration of his term of office. *In this case the clerk refused until he should be paid an agreed price.—Ib.* ---------- 430

3. If a clerk refuses or unreasonably delays making out complete transcripts of the records in his office when so required by litigants, they have a remedy against him on his official bond.—*Ib.*---------- 430

COMITY BETWEEN THE STATES—

1. A citizen of Ohio made to another citizen of that State a voluntary deed, assigning all his estate, debts, &c., everywhere, for the payment of all his own debts, without discrimination or preference, according to the laws of Ohio regulating assignments by "*insolvent debtors.*" After the date of the assignment, Kentucky creditors, in the courts of Kentucky, attached a debt due by a citizen of Kentucky to the non-resident insolvent. The attaching creditors never acceded to the assignment. *Held*—That in the courts of Kentucky the attachment liens have preference over the title and claim of the assignee.—*Johnson vs. Parker, &c.*---------- 149

2. *Resident creditors*, having attached a debt due by a citizen of Kentucky to an insolvent debtor of Ohio, *have preference* in the courts of Kentucky over the assignee of such insolvent debtor, although the assignment was made in Ohio before the attachments were sued out in Kentucky.—*Ib.*---------- 149

3. The principle of comity does not require the courts of one State to recognize and enforce, to the prejudice of its own citizens, assignments made by insolvent debtors under the laws of another State; but they will secure justice to domestic creditors, without regard to the foreign law and assignment.—*Ib.*---------- 149

4. The courts of Kentucky will not abate a suit on a plea of the pendency of a prior suit, on the same debt and between the same parties, in a court of another State.—*Davis vs. Morton, Galt & Co.*---------- 442

5. As between themselves the States of this Union, though integral parts of the same national sovereignty, are yet foreign to, and independent of, each other.—*Ib.*---------- 442

COMMISSION MERCHANTS—

1. Commission merchants are required to sell property consigned to them for sale, within a reasonable time after its receipt, unless otherwise instructed.—*Atkinson & Co. vs. Burton*---------- 299

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COMMISSION MERCHANTS—Continued.

2. Property consigned to commission merchants for sale, is accompanied with a general direction to sell, when no other instructions are given. *Ib.* ---------- 299

3. Commission merchants in New York, for failing to sell tobacco consigned to them for sale, within a reasonable time after its receipt, are liable for its value. Having held the tobacco much longer than a reasonable time for its sale, and until it had depreciated in price, they are held responsible for its value as if converted or appropriated to their use, at the expiration of five months after its receipt, which, in this case, is held to have been a reasonable time for selling. *Ib.* ---------- 299

COMMON SCHOOLS AND DISTRICT TRUSTEES—

1. "JUNE 22d, 1868.

"Mr. Harris: We, the trustees, notify you that we desire you to discontinue the Forest Hill school, from the fact of your price being too high, and through the common rumor of the children.

"WM. J. BERGEN,
"ELBA HILL."

Harris was employed to teach four months, at forty-five dollars per month, by the district trustees, Willis, Bergen, and Hill. On the receipt of the above notice, after teaching about three weeks faithfully and satisfactorily, according to the testimony, Harris retired from the school, and brought this action of tort for damages for wrongful ejection from the school, and on the general issue recovered a verdict of the jury and judgment of the circuit court for one hundred and eighty dollars damages. *That judgment is affirmed.* One hundred and eighty dollars was full pay for four months. In this action of tort, Willis would have been an improper party.—*Hill and Bergen vs. Harris* ---------- 450

2. This is of that class of cases in which readiness to perform is not equivalent to full performance; and there is neither direct allegation nor explicit proof of special damage resulting from loss of character or of other employment; *but the peculiar and disparaging tone of the notice*, and the absence of proof or presumption of any other vacant school, authorized the jury to presume on a loss both of character and time. *Ib.* ---------- 450

3. The trustees of a common school district agreed to pay a teacher, or cause him to receive, the amount of money that may be due that district for 1866, in consideration of his teaching a three months' school.

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COMMON SCHOOLS AND DISTRICT TRUSTEES—Continued.

There being no provision in the contract exempting the trustees from personal liability, they are personally liable on their contract. The amount of this liability may be plead as a set-off by the teacher in an action against him on a note in favor of one of the trustees. (*Civil Code, secs.* 39, 128.)—*Harrison vs. Slone* 577

CONTRACTS—

1. When a party deliberately enters into a contract or transaction forbidden by law, he cannot recover upon the express contract, nor will the law imply one for him.—*Todd vs. Caplinger* 139

2. The fact that, for a few years before his death, the intestate, who was about eighty years old, had occasional fits of nervous disturbance, which required some guardian care of himself and his business by an affectionate son, is altogether insufficient, against a multitude of established facts, to show that he was not competent to dispose of his estate, by contract and conveyances, rationally, justly, and prudently. *Speers, &c., vs. Sewell, &c.* 239

3. The father made an oral contract with his son John, whereby he agreed to convey to John his homestead tract of land, in consideration of John's living with him, attending to his business, and taking care of him and his wife during their lives. *Held*—As there was no written memorial of the contract, John could not, by suit, enforce a specific performance, although he had faithfully complied with his part of the contract; but he has a resisting equity not affected by the statute of frauds and perjuries. For his services, he has an equitable lien on the land, and cannot justly be required to surrender his rightful possession until he shall have been indemnified. Before decreeing dispossession and distribution of the homestead tract of land, the circuit court ought, through its commissioner, to have ascertained the value of John's services in his care and support of his father and mother, and of attention to his father's affairs, over and above his (John's) own maintenance; and, after such finding, John should be protected in the possession until the amount assessed shall have been paid. *Ib.* 239

4. A contract made by telegrams is binding on the parties.—*Calhoun vs. Atchison, &c.* 261

5. "I, Philip McBee, having consented to the above sale, will, at my death, give as much land to Walter McBee, as the vendee of my daughter Henrietta, as to any of the *balance* of my children. March 12, 1862."

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CONTRACTS—Continued.

By the above indorsement on his daughter's written contract of sale of her expectancy in his land, the father divested himself of the right of disposing of the designated portion of his land; and although he died intestate, the purchaser is entitled to an equal interest in his land by virtue of his said contract.—*McBee vs. Myers, &c.* 356

6. A contract to pay a stipulated sum of money for the rent of a house and lot, and also to make certain improvements therein specified, *is not assignable in law, so as to vest the assignee with a right to sue in his own name alone.* The assignor is a necessary party plaintiff or defendant. (*Sec. 6, chap. 22, Revised Statutes*, 1 *Stanton*, 268; *Marcum, &c., vs. Hereford*, 8 *Dana*, 1.) The assignee being the equitable holder, the assignor still holding the legal title, each is an essential party. (*Gill vs. Johnson*, 1 *Met.*, 449; *Lytle vs. Lytle*, 2 *Met.*, 127.) *Hicks & Gill vs. Doty* 420

7. If the debtor is not released by the agreement of another party to pay his debt, such agreement is within the statute, and a writing is necessary; but—*Day vs. Cloe, &c.* 563

8. If the debtor is released, by the agreement of another party to pay his debt, such agreement of *another party*, becomes an undertaking to pay his own debt, and is not within the statute, and it is not necessary that either the agreement or release, should be in writing.—*Ib.* ... 563

CONSTABLES—

1. A summons directed to the sheriff may be executed by a constable or other officer to whom it might have been directed, at the request of the plaintiff, as provided in the Civil Code (section 66), and the return thereon, of the constable or other officer, shall be proof of the time and manner of service (section 73). (*Boaz vs. Nail*, 2 *Met.*, 245.)—*Long vs. Gaines, Berry & Co.* 353

2. When a constable has authority to execute the process of the court having original jurisdiction of the amount of a debt placed in his hands for collection, the sureties in his official bond are liable for the amount when collected by him, which, in this case, was seventy-five dollars. (*Arnold vs. Sommers*, 3 *Bush*, 555.)—*Commonwealth for Young vs. Peters, &c.* 403

COUNTY COURTS—

1. *Subscriptions of one thousand dollars per mile to turnpike roads in Nicholas county, by the county judge*, under the act of February 9, 1864, and acts amending said act, *were unauthorized and void*, it being ad-

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COUNTY COURTS—Continued.

mitted that an amount of stock sufficient, with the aid of said county subscription, to complete each mile of road to which such county subscriptions applied, *had not been taken by private subscription, as required by said acts.* The circuit court erred by dismissing the petition of tax-payers for an injunction to enjoin any payment or levy on account of such unauthorized and void subscriptions.—*Clay and others vs. Nicholas County Court, &c.* ---------- 154

2. A sheriff, who collected money by illegal taxation on a void subscription to turnpikes, by the county court, holds the same as a trust fund for the benefit of the tax-payers who contributed that fund. (*See case next preceding this.*)—*Blair, &c., vs. Carlisle and Jacketown Turnpike Company* ---------- 157

3. An order of the county court, binding a child as an apprentice, should *exhibit the facts required by law*, for giving jurisdiction to the court. If these facts are not stated in the order, *it is void. Small vs. Small*, 2 *Bush*, 45; *Freeman vs. Strong, &c.*, 6 *Dana*, 283.)—*Chaudet vs. Stone* ---------- 210

4. In apprenticing negro or mulatto orphan children, it is the duty of the county court under the act of February 16, 1866 (*Myers' Supplement*, 729), to give the preference to the former owner, if he requests it, provided he is a suitable person.—*Lamb, &c., vs. Lamb* ---------- 213

5. The county court being a court of record, can only speak by its record, especially in the absence of any issue by the pleadings of mistake or fraud.—*Fletcher, &c., vs. Leight, Barrett & Co.* ---------- 303

6. The approval by the county court of an officer's securities must appear of record. However numerous or solvent the proposed securities may be, this does not make the proposed bond official, nor obligatory until the court has passed its judgment of approval; indeed, until this, it is not delivered to the Commonwealth, nor can be. It is this approval, by the tribunal designated by law, which completes its execution and delivery, and makes it obligatory.—*Ib.* ---------- 303

7. When the county court approves the proposed names and individuals as securities in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it until all the named securities sign it, than he has to accept it without the principal's signature. If he may waive the signature of one security, he may waive more, until all are waived.—*Ib.* ---------- 303

8. When the court has designated certain persons and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed

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COUNTY COURTS—Continued.

in conformity to the judgment of approval, else it is not the approved and accepted bond by the court; and every alteration by the clerk, either in omitting a designated party or substituting another, is wholly unauthorized, and his attestation to such a bond of no validity.—*Ib.* ---------- 303

9. When the principal has proposed certain names as his sureties, and these have been approved by the court, each of the sureties as he signs, has both the legal and moral right to expect and rely upon the officers, to see that each approved party shall sign it, and not regard it as an executed and delivered obligation, until so perfected. *Ib.* ---------- 303

10. County courts have constitutional power to remove sheriffs from office for failing to give new bonds at the time prescribed by the court, in a proceeding by notice and motion of sureties as authorized by law. (*State Constitution, sec.* 9, *art.* 6, *and sec.* 19, *art.* 8, *and sec.* 2, *chap.* 97; *Revised Statutes*, 2 *Stanton*, 396–7.)—*Bartly vs. Fraine, &c.* -- 375

11. No power or authority is conferred by the statute on the county court to take the original bond from the sheriff for the collection of the revenue, at any other terms of their court than those named (January or February term), and no option is given to the sheriff; but if he fails to execute the bond at one or the other of the terms prescribed, his office shall thereby be forfeited.—*Calloway, &c., vs. Commonwealth* ---------- 383

12. The power of the county court to require the sheriff to execute supplemental bonds at other terms of the court, after having executed a bond either at the January or February term of the court, either for the indemnity of his sureties or that of the Commonwealth, cannot be questioned.—*Ib.* ---------- 383

See Official Bonds, *post.*

COUNTY JUDGE—

1. The office of postmaster is incompatible with the office of county judge. *Hoglan vs. Carpenter* ---------- 89

2. Whatever may be the powers of the county judge to impose fines upon a jailer for a violation of the rules prescribed by the county court for a willful neglect of official duty, an indictment is a proper remedy provided by the Constitution (*sec.* 36, *art.* 4); and being so provided, no legislative enactment is necessary to give the grand jury jurisdiction.

Note by Reporter.—This case overrules *Commonwealth vs. Mitchell* (3 *Bush*, 39), so far as it is inconsistent with the opinion in this case. *McBride vs. Commonwealth* ---------- 331

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DAMAGES—

1. The penalty of double damages denounced by section 3, article 1, chapter 50, Revised Statutes (2 *Stanton*, 49), against any person not having a lawful fence, who shall, in any mode, hurt, lame, kill, or destroy any cattle which may have broken over or through said fence into his inclosure, applies to one who used and controlled the premises, *whether he was the owner or not.—Jones vs. Hood* 80

2. In an action on an attachment bond to recover expenses, &c., such expenses, and such only, as were incurred in defending the attachment, can be recovered. If part of the expenses, &c., were incurred in defending the attachment, that part may be recovered.—*Johnson vs. Farmers' Bank of Kentucky* 283

3. In an action for a malicious suit and attachment, probable cause not being made out, the plaintiff is entitled to recover damages commensurate with the injury.—*Ib.* 383

4. On the dissolution of an injunction sued out by an executrix for her own benefit as devisee, the judgment for damages was properly rendered against her personally, and not against the assets.—*Offut's ex'x vs. Bradford, &c* 413

5. "JUNE 22d, 1868.

"Mr. Harris: We, the trustees, notify you that we desire you to discontinue the Forest Hill school, from the fact of your price being too high, and through the common rumor of the children.

"WM. J. BERGEN,
"ELBA HILL."

Harris was employed to teach four months, at forty-five dollars per month, by the district trustees, Willis, Bergen, and Hill. On the receipt of the above notice, after teaching about three weeks faithfully and satisfactorily, according to the testimony, Harris retired from the school, and brought this action of tort for damages for wrongful ejection from the school, and on the general issue recovered a verdict of the jury and judgment of the circuit court, for one hundred and eighty dollars damages. *That judgment is affirmed.* One hundred and eighty dollars was full pay for four months. In this action of tort, Willis would have been an improper party.—*Hill and Bergen vs. Harris* 450

DEDICATIONS—

1. It was fatally erroneous in the circuit court to adjudge a conveyance of an acre of land "*for church purposes, and for school purposes*," when, in the writing on which the suit for the conveyance was based, the

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DEDICATIONS—Continued.

defendant agreed to make a voluntary dedication and conveyance *for church purposes only.—McDaniel vs. Watson, &c.* ---------- 234

2. If the congregation to whose uses the defendant agreed, in writing, to make a *voluntary dedication* and conveyance of one acre of land, on which the congregation erected a church building, had ceased to use and occupy the same, for the purposes for which the dedication was made; as it would revert, if it had been conveyed, if such uses had failed before conveyance, *a fortiori*, the defendant would be under no obligation to convey.—*Ib.* ---------- 234

3. To entitle the plaintiffs, trustees of the church, to whose uses the defendant had agreed, in writing, to make a voluntary dedication and conveyance of one acre of land, on which the congregation erected a church building, to a judgment for the conveyance thereof, they ought to have alleged in their petition that the congregation had used and occupied the church, and intended, in good faith, to continue to use and occupy the same for the purposes intended. Failing to make these allegations, the demurrer to the petition should have been sustained.—*Ib.* ---------- 234

DEEDS—

1. Objections to authentications may be answered by presumptions resulting from lapse of time and otherwise.—*Rutherford's heirs vs. Clark's heirs* ---------- 27

2. Recitals in deeds and writings are not evidence when assailed as fraudulent by creditors.—*Jarboe, &c., vs. Colvin, &c.* ---------- 70

3. When land is purchased by parents and conveyed to their minor children, the latter are mere volunteers, and stand in no more favorable attitude and have no higher equities than the parents would have had, if the land had been conveyed to them.— *Worley vs. Tuggle, &c.* 168

4. When, by mistake, oversight, or fraud, the deed or written memorial does not conform to the real contract of the parties, the chancellor can reform the deed or written memorial on satisfactory parol evidence, and then enforce a specific performance according to the real contract. In all such cases if the mistake, oversight, or fraud is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties, and then enforce it.—*Ib.* ---------- 168

5. In the reformation of deeds, the just rights and equities of third and innocent parties, purchasers for a valuable consideration without

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Deeds.

DEEDS—Continued.

notice, are not to be disturbed; for, as between vendor and innocent remote vendees, the loss should fall on the one who, through his own negligence, may, to some extent, be regarded as the author of the misfortune.—*Ib.* ---------- 168

6. A father intending to convey land to his married daughter and the heirs of her body, through mistake conveyed it to her husband and his heirs. This deed is reformed after the death of both grantor and grantee, upon clear and satisfactory evidence.—***Mattingly and wife vs. Speak, &c.*** ---------- 316

7. To authorize the chancellor to annul or modify the terms of a conveyance, or other written instrument, on the ground of mistake as to its contents or legal effect when executed, *such mistake must be established*, and *must not be a mere inference, from the weight of evidence.*—*Ib.* 316

8. Vendor, by a writing for a valuable consideration, bound himself to convey a tract of land to the vendee "*and his lawful children.*" At the date of the writing the vendee had three children, and after that time three more were born to him. The six children are entitled to six sevenths of the tract of land.—*Cessna, &c., vs. Cessna's adm'r, &c.*, 516

9. "CHILDREN," when inserted in a conveyance, or a bond for a conveyance, of land, *is a word of purchase* and not of limitation, and by its insertion in the bond to their father, as there were children then in being, they were parties vendees, just as much as if they had been specially named; and as children were born to him, after the date of the bond, the estate would open up to them, and *such after-born children would take their respective shares.*—*Ib.* ---------- 516

10. A recital in a deed of the consideration paid for land may be evidence between the parties to the deed, but it is no evidence of the fact between the grantees and third parties, and strangers to the transaction.—*Goins vs. Allen, Morton & Co.* ---------- 608

11. An agent's conveyance is not voidable, because he conveyed land of his principal by a less extensive warranty than the power might have authorized.—*McMillan's heirs vs. Hutcheson, &c.* ---------- 611

12. A copy of a deed conveying land in Kentucky, which was made in Philadelphia, and duly acknowledged before and certified by the mayor of that city in 1807, and which was duly recorded in the clerk's office of the Court of Appeals of Kentucky in 1819, was properly admitted as evidence in the circuit court.—*Patterson, &c., vs. Hansel, &c.* ---------- 654

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DEEDS—Continued.

13. When a sale and conveyance of land has been made by an agent under a genuine power of attorney, the acknowledgment of which was defective, the chancellor should compel a proper conveyance, unless there should be other sufficient preventing causes.—*Colsten's heirs vs. Chaudet, &c.* ---------- 666

DE FACTO OFFICERS—

1. Whilst the acts of *a de facto officer* are good and binding as to third parties, as to himself they are null, and may be questioned by any kind of proceedings, and in all proceedings.—*Hoglan vs. Carpenter* ---------- 89

DEPOSITIONS—

1. A deposition being commenced in presence of both parties, too late in the day to be completed, the witness being called off the next day, the party taking on the first day notified the other party that on the next day he would take another deposition, so as to preserve the right to adjourn over to the third day to complete the first deposition. The deposition thus completed on the third day may be read as evidence.—*Jarboe, &c., vs. Colvin, &c.* ---------- 70

2. Exceptions to depositions are deemed to have been waived when the record does not show they were acted on by the circuit court.—*Patterson, &c., vs. Hansel, &c.* ---------- 654

3. Exceptions to depositions having been once filed and acted on by the circuit court, it properly refused to permit exceptions for the same reasons to be again filed.—*Lewis vs. Williams* ---------- 678

DESCENT AND DISTRIBUTION—

1. The father made an oral contract with his son John, whereby he agreed to convey to John his homestead tract of land, in consideration of John's living with him, attending to his business, and taking care of him and his wife during their lives. *Held*—As there was no written memorial of the contract, John could not, by suit, enforce a specific performance, although he had faithfully complied with his part of the contract; but he has a resisting equity not affected by the statute of frauds and perjuries. For his services, he has an equitable lien on the land, and cannot justly be required to surrender his rightful possession until he shall have been indemnified. Before decreeing dispossession and distribution of the homestead tract of land, the circuit court ought, through its commissioner, to have ascertained the value of John's services in his care and support of his father and mother,

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DESCENT AND DISTRIBUTION—Continued.

and of attention to his father's affairs, over and above his (John's) own maintenance; and, after such finding, John should be protected in the possession until the amount assessed shall have been paid. *Speers, &c., vs. Sewell, &c.* ---------- 239

2. When an administrator fails to make a settlement, as required by law, in a suit against him by the heirs for a settlement and distribution, he is not entitled to a judgment for costs against them.—*Ransdell, &c., vs. Threlkeld's adm'r* ---------- 347

3. In a suit against them to subject assets descended to several heirs, it was error to render a joint judgment against them. The circuit court should have ascertained the amount each heir had received by descent, and a several judgment should have been rendered against each one for an amount not exceeding the amount so received, and not exceeding the amount to which the plaintiff was entitled. On the trial of this issue the heirs are personally responsible for the costs, when judgment is rendered against them.—*Ib.* ---------- 347

DEVISES AND DEVISEES—

1. Testator devised that the residue of his estate should be equally divided between his children, *individualized by their respective names*, and his *grandchildren* by a deceased daughter, *designating them also by their names*. For equalization among each and all of his devisees alike, without any discrimination, the testator bequeathed to each of his two grandchildren special legacies the same as he had given to each of his children. *Held*—That under this will, each of the grandchildren took the same as a child; that children and grandchildren must be understood as used for identifying the persons specially named, and not for qualifying the interest of each grandchild more than that of each child.—*Wills, &c., vs. Newton, &c.* ---------- 158

2. "I give to my wife * * * as much of the remainder of my estate, after my debts *is* paid, * * * as will be sufficient for her support during life; and the balance of my estate, both real and personal and mixed, I will to my daughter * * * and her children. * * * I authorize and empower my executrix and executor to sell and convey whatever property, either real or mixed, they may think best, to pay my debts, except my interest in my brother John's estate; * * that I wish to stand undisposed of for the benefit of my daughter * * * and her children." * * * *Held*—The residue of the estate having been disposed of to pay debts, the widow was entitled to her support during life out of the rental of the interest of the testator in his brother John's estate, which was not sold to pay debts. *Mc Casland vs. Martin, &c.* ---------- 198

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DEVISES AND DEVISEES—Continued.

3. LEGACIES "*to be paid by my executor with as little delay as practicable.*"—Legatees, having resisted the establishment of the will by a protracted litigation, are not entitled to interest on their legacies from one year after testator's death (*Rev. Stat., sec.* 2, *art.* 2, *chap.* 46, 2 *Stant.*, 2); as it did not appear that the executor had either used or loaned the money, but held it ready to discharge the legacies, the legatees are entitled to interest only from the establishment of the will.—*Commonwealth for use of Johnson, &c., vs. Lillard's ex'r*.... 398

4. The right of a creditor of a decedent to sue his heirs or devisees in equity, is expressly conferred by the Revised Statutes. (*Sec.* 10, *chap.* 40.)—*Johnson, &c., vs. Belt*.... 405

5. The provision of section 473 of the Civil Code, which requires a demand, of the debt claimed, before an action shall be brought against a personal representative, is restricted in its application to actions against personal representatives. A failure to make, such demand, is not an available ground for dismissing an action against the heirs or devisees of a decedent.—*Ib.*.... 405

DIVORCE AND ALIMONY—

1. During the pendency of a suit for a divorce by the wife, who has abandoned her husband, whether she is entitled, *pendente lite*, to an allowance against him for the maintenance of herself and child, essentially depends on the reasonableness or unreasonableness of her abandonment and refusal to return. But as this can only be decided, on the final hearing, some allowance in the meantime may be proper.—*Cravens vs. Cravens*.... 435

2. The annual income of the husband appears to be about one thousand dollars for the support of himself and two children. In the suit of his wife for a divorce, a *pendente lite* allowance and charge against him of seven hundred dollars for the maintenance of herself and child, a year, is unreasonable and exorbitant. The maximum shown by the evidence to be needful was five hundred dollars. The allowance is reduced to that sum.—*Ib.*.... 435

3. Compensation to the wife's counsel in her suit for divorce is an ulterior question, which cannot be provided for, *pendente lite*, and should not be anticipated in making temporary provision for her support, for which alone the statute authorizes any such allowance.—*Ib.*.... 435

4. A circuit court is authorized to decree a separation or divorce from bed and board for any such cause as it may, in its discretion, deem sufficient. This discretion is not arbitrary or unlimited, but a sound legal discretion, and only to be exercised for such causes as may be deemed sufficient when considered with a just and reasonable regard to the

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DIVORCE AND ALIMONY—Continued.

legal rights and obligations of both parties. (*Revised Statutes, sec. 6, art. 3, chap. 47, 2 Stanton, 20.*)—*Shrock vs. Shrock*..... 682

5. The allegations of the wife that her husband, "*in a fit of anger, drove her away, and told her to take her things and leave, which she did,*" and other reprehensible conduct upon his part, as inducing causes of unhappy relations between them, resulting in her separation from him, were, by order of the court, *erroneously stricken out of her petition* for a divorce from bed and board and alimony. These allegations are held to be sufficient, if true, to entitle the plaintiff to the relief sought.—*Ib.*..... 682

6. Although no legal cause of divorce exists, the right to a decree of separation and alimony, which the law afforded to the wife before the adoption of the Revised Statutes, are not impaired, but recognized by section 6, article 3, chapter 47, Revised Statutes (2 *Stanton*, 20). *Ib.*..... 682

DOGS—

1. If a dog is found roaming on a neighbor's premises without the presence of his owner or keeper, whatever and however innocent may be the temptation of the dog, his life is forfeited if the owner of the premises on which he is found exacts the penalty, and chooses to execute the sentence. (*Act of January* 31, 1865, *Myers' Supplement*, 189.) *Bradford vs. McKibben*..... 545

DOWER—

1. A widow is entitled to dower, as legatee by implication, in the life estate which was devised to her husband, with remainder at his death, to pass by the law of descents to his descendants.—*Jacob vs. Jacob, &c.*..... 110

2. The right of a wife to relinquish a jointure and claim dower in her husband's estate within twelve months after his death, as provided in section 7, chapter 47, Revised Statutes (2 *Stant.*, 26), does not embrace articles, contracts, and jointures entered into between separated husband and wife, to settle existing causes of litigation, and peaceably accomplish by private contract what could be obtained by a costly and vexatious litigation.—*Loud vs. Loud, &c.*..... 453

ELECTION—

1. A certificate of election, or even a commission, is not *prima facie* evidence of eligibility to the office.—*Hoglan vs. Carpenter*..... 89

2. A tie vote for two candidates for the office of town marshal of the town of Princeton, having been received at an election for town

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ELECTION—Continued.

officers, under the special statute, which neither required nor authorized the examiners to do more than to examine the polls and report the legal number of votes cast for each candidate, said board of examiners had no right to decide by casting lots. Such a decision would be illegal and void, and cannot be compelled by mandamus. *Hammock vs. Barnes, &c.* ---------- 390

3. The general law regulating the examining boards in State, district, and county elections, and requiring them to cast lots in cases of tie votes, does not embrace town elections under special statutes for town officers. The circuit court properly refused a mandamus against the board of examiners to compel them to decide by casting lots between two candidates having an equal number of votes for the office of town marshal of the town of Princeton.—*Ib.* ---------- 390

EMANCIPATION OF SLAVERY—

1. The owners of slaves, who voluntarily put them in the Federal army as substitutes in 1864, thereby waived their right to compensation for their value, and emancipated them by their own acts.—*Payne, &c., vs. Richardson* ---------- 207

2. Slaves, voluntarily put in the Federal army in 1864, as substitutes, by their owners, thereby became free and able to contract.—*Ib.*---- 207

3. The hirer of a slave for a term which had not expired on the 18th day of December, 1865, when the Constitutional Amendment abolishing slavery was declared adopted, is entitled to an abatement, *pro tanto*, of the promised price.—*Mundy vs. Robinson* ---------- 342

4. Hiring implies a warranty of title; consequently, should the title fail from any legal cause, by either an eviction by superior title, or authorized act of the government, then there is so far, a failure of consideration, and the bailee or hirer will be entitled to a *pro tanto* abatement.—*Ib.*. ---------- 342

5. Old and infirm slaves having been sold to the lowest bidder—that is, to the one who would agree to provide for them, and bury them plainly and decently, for the least sum—to be paid out of the estate of their owner; being deprived of any control over them by the adoption of the Constitutional Amendment abolishing slavery, the purchaser was thereby released from his obligation to support and bury them, and they became a charge upon public charity.—*Farmers' Bank of Kentucky vs. Johnson, &c.* ---------- 411

6. Testator, a free man of color at the time he made and published his will, previous to the year 1859, had a free wife and three sons; two of them free, one a slave. He devised to his two free sons two lots

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EMANCIPATION OF SLAVERY—Continued.

in Louisville, giving his wife a life estate in one of them, and to her and said two free sons his household and kitchen furniture, and made no disposition of his other personal property. The slave son was emancipated before the death of his father in 1865. *Held*—That, though incapable of taking at the publication of the will, the emancipated son being free at the death of his father, had a descendible and distributable interest in his estate equal to his brothers, and that he should be equalized with them out of the undisposed of personalty before they should be allowed any part thereof, as provided by *section* 17, *chapter* 30, *Revised Statutes* (1 *Stanton*, 426).—*Miller vs. Miller, &c.* ---------- 482

ESTOPPEL—

1. A forthcoming bond executed by a third party, recited "*it being the property of*" *the execution defendant.* This recital is an admission that the execution defendant was the owner of the property, and as the bond suspended the sale by the sheriff and prevented a levy on any other property, the admission, without any proof of fraud or mistake, must be deemed as an estoppel against any claim or proof that such third party was the owner of the property.—*Sparks vs. Shropshire*---------- 550
2. If one of the parties to a bill negotiate it with a forged indorsement, in the name of the payee, he must be understood, as affirming, that the indorsement, is in the handwriting of the payee, or written by his order, and is estopped from denying the genuineness of the indorsement, or setting up the forgery in defense of an action by the holder. (*Story on Bills, sec.* 225; *Hartsman vs. Henshaw, &c.*, 11 *Howard*, 177.)—*Burgess vs. Northern Bank of Kentucky*---------- 600

EVIDENCE—

1. Objections to authentications may be answered by presumptions resulting from lapse of time and otherwise.—*Rutherford's heirs vs. Clark's heirs*---------- 27
2. When proof of heirship is as precise and satisfactory as so long a lapse of time, and the number of claimants, would reasonably enable such parties to obtain in any case, the law requires no more.—*Ib.*---- 27
3. The declaration of parties, if deceased, that they were married, provided they were made, *ante litem motam*, are admissible of the fact declared. Such declarations made by parents in life are admissible as evidence to establish the legitimacy of their issue. (*Goodnight vs. Moss, Cowp.*, 591, *and cases cited.*)—*Dannelli, &c., vs. Dannelli's adm'r*---------- 51

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Evidence.

EVIDENCE—Continued.

4. The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy, and in the absence of evidence to the contrary a child *eo nomine* is therefore legitimate. (2 *Hogg C. R.*, 197; 4 *Eng. Eccl. R.;* 13 *Ves.*, 145; 23 *N. Y.*, 107.)—*Ib.* 51

5. The presumption of legitimacy is not lightly repelled by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory, and conclusive.—*Ib.* 51

6. Land purchased at a decretal sale having been conveyed to the purchaser, *the assignment of the certificate of purchase*, dated anterior to the conveyance to a third party, of itself, is no evidence as to persons not parties to the assignment when assailed as fraudulent by creditors.—*Jarboe, &c., vs. Colvin, &c.* 70

7. Recitals in deeds and writings are not evidence when assailed as fraudulent by creditors.—*Ib.* 70

8. A witness having the same character of action against the same defendant, is not disqualified as a witness for the plaintiff; his similarity of interest would only go to the credibility of the witness.—*Ib.* 70

9. A certificate of election, or even a commission, is not *prima facie* evidence of eligibility to the office —*Hoglan vs. Carpenter* 89

10. A denial in an answer, which is not such as the Code requires, dispenses with extraneous proof.—*Moorman vs. Beauchamp* 145

11. An affirmative allegation in an answer, that the lien attempted to be enforced by the plaintiff, had been waived, is not of itself proof of such alleged waiver.—*Ib.* 145

12. The evidence of the draftsman alone, since the adoption of the Civil Code, is sufficient to establish the allegation of *mistake*, though denied in the answer. (*Civil Code, sec.* 142)— *Worley vs. Tuggle, &c.* ... 168

13. The rule which required two witnesses or one witness, and strong corroborating circumstances, to overcome a denial in an answer in chancery, has been changed by the Civil Code, section 142. (*Albro vs. Lawson*, 17 *B. Mon.*, 644; *Enders vs. Williams*, 1 *Metcalfe*, 354–5.) *Ib.* 168

14. A memorandum made by a clerk in a bank was read without objection after his death as evidence in this case, showing that he had delivered a notice of protest at the residence of the indorser, by leaving it with his daughter. It is not decided whether said memorandum ought to have been admitted as evidence or not, if it had been objected to.—*Bank of Kentucky vs. Duncan* 294

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EVIDENCE—Continued.

15. A stockholder in a bank is a competent witness for the bank (*Civil Code, sec.* 675; *Covington and Lex. R. R. Co. vs. Ingles*, 15 *B. Mon.*, 641; *Lackey vs. Richmond and Lancaster T. P. R. Co.*, 17 *B. Mon.*, 48); and however the interest of the witness might be regarded as affecting his credit; in this case the circuit court rightly overruled the exception to his deposition, and especially so, as he is shown to have been indemnified against loss, by the result of the suit, by the corporation of which he was a member.—*Petitt & Co. vs. First National Bank of Memphis* 334

16. A recital in a deed of the consideration paid for land may be evidence between the parties to the deed, but it is no evidence of the fact between the grantees and third parties, and strangers to the transaction.—*Goins vs. Allen, Morton & Co.* 608

17. A copy of a deed conveying land in Kentucky, which was made in Philadelphia, and duly acknowledged before and certified by the mayor of that city in 1807, and which was duly recorded in the clerk's office of the Court of Appeals of Kentucky in 1819, was properly admitted as evidence in the circuit court.—*Patterson, &c., vs. Hansel, &c.* 654

18. The jury undoubtedly have the right in ejectment, as in other cases, to weigh probabilities and solve doubts as to matters of fact; but if, in their opinion, the preponderance of proof or of rational inference as to any fact on which the title depends, be not on the side of the plaintiffs, they ought not to find for them. (*Griffith vs. Dickens*, 2 *B. Mon.*, 20.)—*Ib.* 654

EXECUTIONS—

1. A sheriff is responsible, when he has an execution in his hands, whether the defendants had property sufficient to pay the whole debt or a part of it.—*Commonwealth for Tiffany vs. Hurt, &c.* 64

2. If there are more defendants in the prior executions than are in those subsequently delivered, it would be the duty of the sheriff to make all the debts, by collecting from the defendants who were not in some of the executions, if he could do so.—*Ib.* 64

3. A sheriff is not responsible for failing to return an execution to the proper office, if he acts in obedience to the orders of the plaintiff; but it is incumbent on him to make out his defense by evidence. A letter of the execution plaintiff's attorney, when he is proven to be such, would be evidence for the sheriff, as an excuse for failing to return execution.—*Ib.* 64

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Executions.

EXECUTIONS—Continued.

4. It is the duty of a sheriff, when he levies an execution, to state the facts on the writ and sign it.—*Ib.* ---- 64

5. If a sheriff levies an execution on property of the defendant, and afterwards permits him to remove or dispose of it in such way as to deprive plaintiff of his debt, the sheriff and his sureties are liable, although no levy was indorsed on the execution. In such case *proof aliunde* would be admissible.—*Ib.* ---- 64

6. Land fraudulently sold by executory contract before, but conveyed after, the levy of executions thereon, against the fraudulent vendor, *was subject to sale under the executions*—the sale being valid and maintainable, the whole title passed to the purchaser.—*Daniel vs. McHenry* ---- 277

7. Possession of land acquired after the levy of executions thereon, was not adverse to the purchaser at the sale under the executions, because the purchase, and the rights of the purchaser, relate back to the levy. Nor can the sale, by reason of such possession, be regarded as champertous.—*Ib.* ---- 277

8. A sale of more land than was authorized by the executions, *is binding on the purchaser, at the owner's option; but such sale is voidable, at the owner's option.* The owner may, therefore, affirm the sale or waive an avoidance, or by his conduct become estopped from urging it. *Such sale is not absolutely void, but may be avoided.—Ib.* ---- 277

9. In this case, the land appears to have been sold for sixty-two dollars more than was authorized by the executions, the execution defendant having acquiesced in, and made no objection to the sale for more than a year. In an action by the purchaser against the fraudulent vendee of the execution defendant, for possession of the land, the execution defendant not being made a party, and no objection being made in the circuit court to the sale, or title, of the purchaser, on account of such excess, it cannot, for the first time, be made an available defense in the Court of Appeals, by such fraudulent vendee. *Ib.* ---- 277

10. Inadequacy of the price for which land was sold under executions, cannot be complained of, by either the execution defendant, or his fraudulent vendee, when such inadequacy resulted chiefly from their own misconduct.—*Ib.* ---- 277

11. The "act regulating the sale of partnership property taken in execution for the separate debt of one of the partners," approved February 12, 1858 (*Revised Statutes*, 2 *Stanton*, 513-14-15), was intended to pro-

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EXECUTIONS—Continued.

vide only for sales of partnership property, and did not contemplate sales of the interest of a joint tenant of land.—*Brown, &c., vs. Burdett, &c.* 401

12. When a sale of personal property, upon which an execution is levied, has been suspended, by persons not defendants in the execution, as provided by section 713 of the Civil Code, any equitable cause can be shown against judgment on such bond, in whole, or any part thereof.—*Williams vs. Smith* 540

13. When partnership property has been levied on to satisfy an execution against one of the partners, a settlement of the partnership should be made, and only the interest of that partner, subjected to sale, if any interest remains to him, on such settlement.—*Ib.* 540

14. It is the duty of the sheriff levying on joint property, to satisfy the separate debt of one of the owners, first to notify in writing the other joint owners, and if they fail to give the officer notice of their claim, as required by the act of February 12, 1858 (*Myers' Code, p.* 202), he may then proceed to advertise and sell the property so levied upon. If the other joint owners suspend the sale by executing bond as authorized by section 713 of the Civil Code, this will be deemed as a waiver of the notifications prescribed in said act, and the cause may be finally disposed of upon equitable principles.—*Ib.* 540

15. A forthcoming bond executed by a third party, recited "*it being the property of*" *the execution defendant.* This recital is an admission that the execution defendant was the owner of the property, and as the bond suspended the sale by the sheriff and prevented a levy on any other property, the admission, without any proof of fraud or mistake, must be deemed as an estoppel against any claim or proof that such third party was the owner of the property.—*Sparks vs. Shropshire* 550

16. On a judgment for one thousand three hundred and thirty-three dollars and thirty-three cents, with interest from December 25, 1859, less one hundred dollars paid January 14, 1860, the clerk issued an execution for the full amount and costs, making no indorsement of the one hundred dollars' credit on the execution. This execution was levied upon land, which was sold in 1863, and purchased by the execution plaintiff at one thousand six hundred and sixty-six dollars and ninety cents, which about covered the amount of the execution and costs. The sheriff made a deed for the land September 13, 1865. At the March term, 1867, the execution defendant moved the court to quash

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EXECUTIONS—Continued.

the execution, levy, and sale. *The judgment of the circuit court, overruling that motion, is reversed.* The execution was not authorized by the judgment.—*Davie vs. Long's adm'x* 574

17. The quashal of an execution, levy, and sale of land, because a credit was not indorsed on the execution, leaves the judgment in full force, and the plaintiff may take out another execution.—*Ib.* 574

18. An officer transcended his authority by selling a horse under execution for forty-six dollars and five cents, and taking the purchaser's bond, payable to the plaintiff, for the whole of that amount, when the debt and costs did not amount to half that sum.—*Carrington vs. Herrin, &c.* 624

19. In order to protect himself from responsibility by taking an indemnifying bond, the officer must take the bond before the sale is made, and he should return it to the proper office whence the execution issued. (*Civil Code, secs.* 709, 710, 711.) A bond taken after the sale does not constitute a protection to the officer, if he were otherwise a trespasser.—*Ib.* 624

20. HOUSEKEEPER.—Proof that a man with a family, in consequence of some domestic difficulty, had absented himself from his home, and was staying at the house of a sister, when his horse, his only work beast, was taken under an execution, is not sufficient evidence, that he had ceased to recognize the residence of his wife and children as his home. *Ib.* 624

21. The object of the exemption from execution, being the benefit of the family of a debtor, by placing certain enumerated articles of property beyond the reach of creditors, the provisions of the statute should be fairly and liberally construed with reference to its object; and it would do violence to the beneficent object of the law to so construe it, as to allow a mere neglect or dereliction of duty, on the part of the head of a family, even if it be a temporary abandonment of his home, to deprive the wife and children of the rights which it was intended by the statute to secure to them.—*Ib.* 624

EXECUTION SALES OF ENCUMBERED PROPERTY—

1. *A lien for purchase money*, reserved by a vendor in a conveyance to his vendee, is not such an encumbrance as is embraced in, and provided for by, section 1, article 15, chapter 36, Revised Statutes (1 *Stanton*, 488), regulating sales of encumbered property under execution.—*Bondurant vs. Owens* 662

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EXECUTION SALES OF ENCUMBERED PROPERTY—Continued.

2. The said provisions of the Revised Statutes regulating sales of encumbered property under execution *do not apply to vendor's liens which were not created by "mortgage, deed of trust, or otherwise,"* after the vendee became possessed of the legal title.—*Ib.* ---------- 662

3. The vendee's legal title to land, which is encumbered by a lien for unpaid purchase money reserved in his vendor's conveyance, is subject to levy and sale under execution by virtue of section 1, article 13, Revised Statutes (1 *Stanton*, 482).—*Ib.* ---------- 662

4. The purchaser, under execution sale of land so encumbered by a vendor's lien, acquires all the title of the execution defendant subject to the vendor's lien; and in case the land sold for less than two thirds of its valuation, also subject to the right of redemption within one year. The purchaser having received the sheriff's deed, by paying off the vendor's lien, becomes possessed of the absolute title to the land, and the execution defendant has no right of redemption under section 1, article 15, chapter 36, Revised Statutes.

So far as this case is inconsistent with Hinton vs. Mitchell, &c., 1 *Duvall*, 382, the latter is overruled.---------- 662

EXECUTORS AND ADMINISTRATORS—

1. Power to sell land to pay debts and legacies is peremptory on the executor, and is, in no sense, a directory power.—*Rutherford's heirs vs. Clark's heirs*---------- 27

2. A Virginia executor, under a will probated in that State, has no power to sell lands of his testator, situated in Kentucky, until after probate and qualification in Kentucky. Sales of lands in Kentucky by such executor, before probate and appointment or qualification in this State, are void.—*Ib.* ---------- 27

3. The statute of 1810 authorized an administrator *de bonis non* to exercise all the powers of the original executor.—*Ib.*---------- 27

4. The bond of an administrator executed in a Kentucky county court in 1847, is not void, because all the obligors therein were residents of Virginia. As there was no law prohibiting it, the court will not adjudge it illegal.—*Ib.* ---------- 27

5. A Virginia executor, without power to sell, had no power to lease the lands of his testator situated in Kentucky, otherwise than as the agent of the heirs and devisees; and tenants under his leases were, in law, their tenants, and such tenants could not rightfully or availa-

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EXECUTORS AND ADMINISTRATORS—Continued.

bly attorn to any other claimant than the equitable or legal reversioner.—*Ib.* ---------- 27

6. When a will directs a sale of real estate, if necessary for the payment of debts or legacies, a purchaser at any such sale not being presumed to know the condition of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale and consequent want of authority to make it. In this case the purchasers are presumed to have seen the will and to have had reasons to apprehend that neither unpaid debts nor legacies required the sale of the land, and the sale and conveyance are canceled and held to *have been unauthorized and constructively fraudulent.—Ib.* ---------- 27

7. Rutherford died, and his will was probated in Jefferson county, Virginia, in 1805. His will authorized his executor to sell his lands in Virginia and Kentucky, if necessary, to supply any deficiency in his personal assets in the payment of his debts and legacies. By a settlement made in the Virginia court in 1822, it appears that his estate was then indebted to his original executor, then deceased, nine thousand dollars, on account of debts and legacies paid in excess of assets received. In 1847, the then administrator *de bonis non*, in Virginia, had the will probated and himself appointed administrator in Kentucky, and the same year conveyed a tract of land, in Laurel county, for a very inadequate consideration. Suit of Rutherford's heirs to cancel and set aside the sale and conveyance, was dismissed by the circuit court. The decision of the circuit court is reversed, and the sale and conveyance held to be unauthorized and constructively fraudulent.—*Ib.* ---------- 27

8. "*I authorize and request my executors*" *to sell lands;* the mere authority to sell could not have been a constructive conversion, but the superadded "*request*" *was mandatory;* such request is synonymous with *require*, or *direct*, or *order*. Whatever a testator expresses *as his will*, is legatory; and if that will is unqualified, the executors have no right to refuse its fulfillment.—*Green vs. Johnson, &c.* ---------- 164

9. A request to executors to convert certain lands into money *is, in equity, a conversion, and the legatees took money instead of land*, and when the legatee died childless, without electing to keep the land, or being competent to so elect, her interest in the unsold land *was not realty but personalty*, which went to her husband, or to him as her administrator.—*Ib.* ---------- 164

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EXECUTORS AND ADMINISTRATORS—Continued.

10. When an administrator fails to make a settlement, as required by law, in a suit against him by the heirs for a settlement and distribution, he is not entitled to a judgment for costs against them.—*Ransdell, &c., vs. Threlkeld's adm'r* 347

11. An injunction against the creditors of a decedent, cannot be sued out more than three years after the qualification of the personal representative. (*Civil Code, sec.* 472.)—*Offut's ex'x vs. Bradford, &c.*.. 413

12. On the dissolution of an injunction sued out by an executrix for her own benefit as devisee, the judgment for damages was properly rendered against her personally, and not against the assets.—*Ib.* ... 413

13. In an action by a personal representative, a set-off verified by affidavit, and proved, without any demand for the payment thereof, may be plead by the defendant.—*Millet & Co. vs. Watkins' adm'r*..... 642

14. Testator, who resided and died in Virginia, made and published his will in 1818, and in 1820 appended to it the following codicil: "All the lands I hold in the States of Kentucky, Ohio, and Illinois, shall be, and *are hereby, constituted a fund for the payment of my debts;* and I hereby authorize and direct my executors to sell and dispose of my said western lands in such manner, and upon such terms, and at such times as they shall deem most advantageous, and to apply said western lands themselves, or the proceeds of sale thereof, so far as necessary, to the payment of my debts. If any balance of said fund hereby provided for the payment of my debts shall remain, after satisfaction thereof, the same shall be distributed as in the residuary clause of my will above directed." Testator nominated three executors. The surviving and only acting executor, who qualified as such in Kentucky, in 1847, by a written power of attorney, authorized his agent to sell the lands in Kentucky, which were embraced in the above codicil. In 1850 said agent sold and conveyed certain tracts of said land. In 1857, the heirs of the testator brought suit against subsequent vendees in possession to recover the lands so sold. This suit was transferred to equity on motion of defendants. *The circuit court dismissed the petition of said heirs, and that judgment is affirmed. Held—*

First. That it was the intention of the testator to convert the whole of this land into money.

Second. That, as the trust was confided to his executors, the title vested in them, just as if it had really been converted; for in equity, that which should be done will be regarded as done, and, of conse-

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EXECUTORS AND ADMINISTRATORS—Continued.

quence, the trust could be executed by the surviving executor. The land could be sold and conveyed by him; and especially as our statute (1 *Morehead & Brown's Statutes, page* 666) fully authorized the surviving executor to sell the lands devised to be sold.

Third. That the surviving executor, being invested with the title, and the right to sell and convey, he could delegate either generally or specially his own authority, and that his sale by his authorized agent was as effectual as if made by himself.—*Colsten's heirs vs. Chaudet, &c.* ---------- 666

See WILLS.

EXEMPTION FROM EXECUTION—

1. HOUSEKEEPER.—Proof that a man with a family, in consequence of some domestic difficulty, had absented himself from his home, and was staying at the house of a sister, when his horse, his only work beast, was taken under an execution, is not sufficient evidence, that he had ceased to recognize the residence of his wife and children as his home. *Carrington vs. Herrin, &c.* ---------- 624

2. The object of the exemption from execution, being the benefit of the family of a debtor, by placing certain enumerated articles of property beyond the reach of creditors, the provisions of the statute should be fairly and liberally construed with reference to its object; and it would do violence to the beneficent object of the law, to so construe it, as to allow a mere neglect or dereliction of duty on the part of the head of a family, even if it be a temporary abandonment of his home, to deprive the wife and children of the rights which it was intended by the statute to secure to them.—*Ib.* ---------- 624

EXPECTANCIES, SALES OF—

1. "I, Philip McBee, having consented to the above sale, will, at my death, give as much land to Walter McBee, as the vendee of my daughter Henrietta, as to any of the *balance* of my children. March 19, 1862."

By the above indorsement on his daughter's written contract of sale of her expectancy in his land, the father divested himself of the right of disposing of the designated portion of his land; and although he died intestate, the purchaser is entitled to an equal interest in his land by virtue of his said contract.—*McBee vs. Myers, &c.* ---- 356

EXTORTION BY MILITARY FORCE—

1. A band of Federal soldiers arrested Stout and took him to Catlettsburg, where he was released on condition that he would execute his notes to the owners of certain horses impressed by Confederate recruits in

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EXTORTION BY MILITARY FORCE—Continued.

the taking of which he had no agency. One of these notes was assigned and collected by military duress. The judgment of the circuit court *for restitution* against the assignor and assignee of the note *is affirmed.—Voiers and Parker vs. Stout* 572

2. Payment of a note extorted by military arrest being coerced by military duress, the law implied a promise to make restitution, and the assignor and assignee are jointly liable on that promise. Although they had no agency in extorting the note or coercing payment, each of them was apprised of the want of a valuable or legal consideration.—*Ib.* 572

FEES AND FEE BILLS—

1. Allowances made by county courts to jailers for fees and services as such, cannot be attached in the hands of the sheriff.—*Webb vs. McCauley* 8
2. Fees and allowances to jailers being necessary, and provided by law, to enable them to discharge their official duties, public policy will not permit a creditor, to attach these fees and allowances, in the hands of the sheriff.—*Ib.* 8
3. If a justice of the peace presides at more than one examining court on the same day, he is entitled to the two dollars per day for each case, to be paid out of the Treasury. (*Revised Statutes, Myers' Supplement*, 155-6.)—*Johnson vs. Auditor* 321

FENCES—

1. The penalty of double damages denounced by section 3, article 1, chapter 50, Revised Statutes (2 *Stanton*, 49), against any person not having a lawful fence, who shall, in any mode, hurt, lame, kill, or destroy any cattle which may have broken over or through said fence into his inclosure, applies to one who used and controlled the premises, *whether he was the owner or not.—Jones vs. Hood* 80
2. In an action for killing a mare by chasing her with dogs by the defendant, within a field under his control, not inclosed by a lawful fence, *it was error to instruct the jury that the defendant was not liable to damages, if he only did what other prudent persons might have done. Ib.* 80

FORCIBLE ENTRY AND DETAINER—

1. The traverse to an inquisition, on a warrant of forcible entry, before a justice, is required to be filed within three days after the inquisition. If not filed within the prescribed time, and bond for an appeal is executed, it cannot be filed in the circuit court, *nunc pro tunc.—Burchett vs. Blackburn* 553

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FORCIBLE ENTRY AND DETAINER—Continued.

2. The required traverse is the only prescribed mode of appealing, and is necessary to give jurisdiction to the circuit court to retry the truth of the inquisition held before the justice in the country. The recitals in the bond might be presumptive evidence of the filing of the traverse, in the absence of any opposing fact or testimony.—*Ib.*... 553

3. Unless the traverse is filed within the three days, the justice is required to enforce his judgment. A subsequent traverse would not suspend the judgment, nor give jurisdiction to the circuit court to try the truth of the inquisition.—*Ib.* ... 553

FRAUD AND FRAUDULENT CONVEYANCES—

1. The fact that, for a few years before his death, the intestate, who was about eighty years old, had occasional fits of nervous disturbance, which required some guardian care of himself and his business by an affectionate son, is altogether insufficient, against a multitude of established facts, to show that he was not competent to dispose of his estate, by contract and conveyances, rationally, justly, and prudently. *Speers, &c., vs. Sewell, &c.* ... 239

2. Land fraudulently sold by executory contract before, but conveyed after, the levy of executions thereon, against the fraudulent vendor, *was subject to sale under the executions*—the sale being valid and maintainable, the whole title passed to the purchaser.—*Daniel vs. McHenry* ... 277

3. Inadequacy of the price for which land was sold under executions, cannot be complained of, by either the execution defendant, or his fraudulent vendee, when such inadequacy resulted chiefly from their own misconduct.—*Ib.* ... 277

4. In 1864 a bond for two lots was assigned, as collateral security, and in 1866 the assignor sold one of the lots to the assignee, in payment of his debt, which was the full value of the lot. The sale of 1866 cannot be successfully assailed as fraudulent under the act of 1856, by creditors whose debts were created after the assignment of the bond. If any preference was given, it was given by the assignment of 1864. *Mundy vs. Mason, &c.* ... 339

5. The purchaser of land at a decretal sale, agreed verbally with the defendant owner, that he would become the purchaser, in order to avoid a sacrifice, and that all legal and equitable rights which he might acquire as a purchaser should operate as a mortgage to secure the repayment of whatever sums he might have to pay; and that the defendant might redeem the land by paying the sale bonds, or by re-

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FRAUD AND FRAUDULENT CONVEYANCES—Continued.

funding the amount the purchaser might pay thereon, with interest, and thus avoid the sale, or become entitled to a reconveyance of the land. The defendant paid four hundred dollars on the purchaser's bonds. The purchaser obtained an absolute conveyance, and afterwards sold and conveyed the land to a third party, who had notice of the agreement above. *Held*—That the purchaser and his vendee with notice, held the title thus acquired, in trust for the defendant debtor, and that they could not evict him from the possession of the land.

That the acts of the purchaser in obtaining the absolute title and selling and conveying the land were fraudulent; and that parol evidence was competent to prove the contract and fraud.

That the verbal contract to make the purchase and hold the land for the benefit of the defendant debtor, did not come within the statute of frauds. (*Langhorne vs. Payne*, 14 *B. Mon.*, 624; *Martin vs. Martin*, 16 *B. Mon.*, 8; *Miller's heirs vs. Antle*, 2 *Bush*, 407; *Thomas vs. McCormack*, 9 *Dana*, 108.)—*Green vs. Ball*..... 586

6. Whatever may have been the character of the commerce between the agent making the sale of the land, and his vendee, in making the purchase, the innocent vendees of the latter, in good faith, for valuable consideration, could not be affected thereby.—*Colsten's heirs vs. Chaudet, &c.*..... 666

FRAUDS AND PERJURIES, STATUTE OF—

1. "This is to certify that we, James W. Overstreet and Franklin W. Rice, have this day swapped farms, and the said Overstreet agrees and binds himself to pay to the said Rice one thousand dollars by the first day of March next, or the time of exchanging places, and the balance, seven hundred dollars, twelve months from time of exchanging places, this 31st December, 1866.

"J. W. Overstreet,
"F. W. Rice."

The parties exchanged possession of the farms February 21, 1867. Rice sued for the payment, and Overstreet defended upon the ground that the contract was not enforceable, &c. *Held*—That this instrument of writing does, at least, evidence a contract of mutual exchange of lands in *presenti;* and though it were not enforceable within itself, unaided by extraneous circumstances, for want of certainty in specifying what lands were exchanged, yet, when the parties, by their subsequent acts, have rendered this uncertainty

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FRAUDS AND PERJURIES, STATUTE OF—Continued.

sure, by taking possession and consummating the mutual exchange, it is too late for either party, to say there is no memorandum in writing, signed by the party to be charged; and especially when the vendor shows that he is both able and willing to convey, the vendee in possession, shall not be heard to set up such a defense.—*Overstreet vs. Rice* ---------- 1

2. If the written memorial of the sale of lands were voidable for uncertainty when first executed, this impediment may be removed by the subsequent acts of both parties.—*Ib.* ---------- 1

3. Courts of equity will enforce a specific performance of a contract within the statute where it has been partly executed; for, otherwise, one party would be able to practice a fraud upon the other, which was not the intention of the statute. Great caution is to be used in the determination of what is a part execution. (1 *Story's Equity Jurisprudence, sec.* 759, *et seq.*; 4 *Bibb*, 466; 3 *Mon.*, 445; 3 *Littell*, 264.) *Ib.* ---------- 1

4. No one can be compelled to convey lands unless the sale be attested by a writing. When, however, a contract of sale is so attested, though through fraud, omission, or mistake, the real sale, as made, is not set forth, the current of American authorities recognizes the power and duty of the chancellor, to reform the writing and enforce it, when certainly coming within the provisions of the statute of frauds and perjuries; but when not coming within the statute, there is no contrariety of adjudicated authorities in England or America, for it then falls within the general jurisdiction of the chancellor, to correct, for fraud, omission, or mistake, unqualified by the statute, and justified by the same exceptions to that rule of evidence which recognizes written as higher and more reliable than parol testimony.—*Worley vs. Tuggle, &c.* ---------- 168

5. If the debtor is not released by the agreement of another party to pay his debt, such agreement is within the statute, and a writing is necessary; but—*Day vs. Cloe, &c.*---------- 563

6. If the debtor is released, by the agreement of another party to pay his debt, such agreement of *another party*, becomes an undertaking to pay his own debt, and is not within the statute, and it is not necessary that either the agreement or release, should be in writing.—*Ib.*__ 563

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FUTURE CONTINGENT INTERESTS, SALES OF—

1. The purchaser of real estate sold under a decree of the court, as prescribed by the *act of August* 23, 1862, entitled "*An act authorizing the sale of real estate and slaves, in which there is a future contingent interest*" (*Myer's Sup.*, 426), by complying with the terms of the sale prescribed in the decree, is vested with all the title of the present and future, or contingent claimants to said real estate.—*O'Neal vs. Bannon* ---------- 23

2. The purchaser of real estate, *sold under a decree of court* for reinvestment, *cannot be prejudiced by the failure of the court* to provide for the securing and reinvestment of the proceeds of the sale, and securing the title thus acquired to all who may be interested therein.—*Ib.* 23

GARNISHEE—

1. A garnishee, being called on in plaintiff's petition *to answer and say what amount he is indebted to his co-defendant* against whom the plaintiff had a return of "*no property*," the garnishee being served with a summons, and failing to answer, the petition is taken for confessed; and, on his allegation of indebtedness in a specified sum, the plaintiff is entitled to judgment for that amount against the garnishee. (*Civil Code, secs.* 248, 474.)—*Bowen vs. Emmerson, &c.* ... 345

GUARDIAN AND WARD—

1. In the absence of a statutory guardian, the public guardian could take control of suits which he might find pending and not prosecuted for the want of a statutory guardian.—*Marshall vs. Marshall* ------ 248

2. When the guardian offered to file an amended petition, making the necessary allegations and the proper parties, for the purpose of curing any defects in the proceedings for the sale of his ward's land, the circuit court erred by sustaining the purchaser's exceptions to the sale, and also by sustaining a demurrer to the amended petition of the guardian. (*Boyce and wife vs. Sinclair*, 3 *Bush*, 264.)—*Mahoney, gd'n, vs. McGee* ---------- 527

HOMESTEAD EXEMPTION—

1. *The right of exemption, of a homestead*, under the act of February 10, 1866 (*Myers' Supplement*, 714), depends upon the present and actual purpose, and intention, of the debtor to use and enjoy the property sought to be exempted, as a home for himself and family, and *that right does not exist* where the residence of the debtor and his family is permanently located elsewhere.—*Brown, Bro. & Co. vs. Martin & Co.* ---------- 47

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HOMESTEAD EXEMPTION—Continued.

2. A mortgage upon the land, and actual dwelling and home, of the mortgagor, waives his right of exemption to a homestead, as provided in the act of February 10, 1866 (*Myers' Supplement*, 715), unless the land and homestead so mortgaged should sell so as to pay the mortgage debts, and still leave the homestead or its equivalent in money. *Jarboe, &c., vs. Colvin, &c.* ---------- 70

3. When the actual homestead is mortgaged and sold, the mortgagor is not entitled to a homestead in his other lands, as against his then creditors.—*Ib.* ---------- 70

4. The homestead exemption provided for by act of February 10, 1866 (*Myers' Sup.*, 714), does not apply to debts or liabilities created or incurred before the 1st day of June, 1866. It does not apply to a note executed after that date, as a renewal of a note given before that date. The renewal of a note is not a satisfaction of a debt, but only a change of the evidence of it. (*Lowry vs. Fisher*, 2 *Bush*, 70.)—*Pryor, assignee, &c., vs. Smith, &c.* ---------- 379

HUSBAND AND WIFE—

1. In payment for the wife's lot, sold and conveyed by the husband and wife, the purchaser assigned to her a note for eight hundred and fifty dollars. The husband afterwards, without objection on her part, appropriated the proceeds of the note to the improvement of a lot for which he held the title bond of his vendor. *This was such a conversion and possession of the proceeds of the wife's property as to vest it absolutely in the husband*, and render it liable for his debts, even in opposition to his wife's claims for an equitable provision for herself and children.—*Watson vs. Robertson* ---------- 37

2. If the wife have a *chose in action* or a right to property not reduced to possession, and which cannot be reached by a creditor of the husband without the aid of a court of equity, the chancellor will not subject it to the debt of the creditor, in opposition to the wife's claim to have a suitable provision made for herself and children; yet, when it has been so reduced to possession, or converted by the husband to his use, and especially where this is done without any intention of making the wife her husband's creditor, or otherwise preserving her individual rights, the court will not interpose to provide for her to the exclusion of the claim of creditors. (*Whitesides vs. Dorris and wife*, 7 *Dana*, 108; *Martin vs. Trigg, &c.*, 8 *B. Mon.*, 529; *Latimer vs. Glenn*, 2 *Bush*, 543.)—*Ib.* ---------- 37

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HUSBAND AND WIFE—Continued.

3. Husband and wife conveyed real estate to a trustee with power to sell, to secure a debt, due by the husband to the wife, and to hold the proceeds of the sale for the separate use of the wife. A conveyance of such real estate by the trustee, in which the husband and wife joined, passed to the purchaser an indisputable title. (*Revised Statutes*, 2 *Stanton*, 32.)—*Belknap vs. Martin* ---------- 43

4. The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, courts are bound to assume it to be moral rather than immoral, and credit is given to the assertion of parties, whether express or implied, of a fact peculiarly within their own knowledge.—*Dannelli, &c., vs. Dannelli's adm'r* ---------- 51

5. By the laws of Kentucky actual marriage and subsequent recognition would legitimate a child born before the marriage.—*Ib.*------ 51

6. *Whilst under the statute a married woman, having estate, may bind herself for necessaries, it is essential* that the credit originally, should be given to her, and not alone to her husband; for if to him alone, and she afterwards signs a note with him therefor, she will not then be an original debtor, but a mere surety, and her property cannot be subjected to its payment.—*McMahon vs. Lewis* ---------- 138

7. Husband and wife conveyed thirty-two acres of her land, in part pay for three hundred and forty acres, which he purchased, and which was conveyed to the husband. Before the wife agreed to join in the conveyance of her land, her husband agreed, verbally, that he would indemnify her in the three hundred and forty acres, and she was also advised that he would hold the land conveyed to him, in trust for her to the extent of the price of her thirty-two acres. *Held by the court*—That, as the deeds contained no reservation in her favor, one of them divested her of her title, and the other vested in her husband the land he purchased in part with it. These transactions constituted a complete conversion and reduction of her estate in the land by her husband to his possession, and generally when this is done a court of equity will not interpose to provide for the wife to the exclusion of the claims of creditors, and also that no trust resulted in favor of the wife. (*Whitesides vs. Dorris and wife*, 7 *Dana*, 108; *Martin vs. Trigg*, 8 *B. Mon.*, 529; *Latimer vs. Glenn*, 2 *Bush*,

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HUSBAND AND WIFE—Continued.

543; *Revised Statutes, section* 22, *chapter* 80, 2 *Stanton*, 230.)—*Pryor, assignee, &c., vs. Smith, &c.* 379

8. When a deed of trust, vesting separate property in a married woman, expressly authorizes its subjection by her creditors, any one of her creditors has a right to avail himself of that liability for satisfying his own demand, without alleging that he was the only creditor, or making other creditors, if any, parties.—*Goldburg and wife vs. Drabelle* 426

9. A married woman purchased goods and gave her own notes for the price, and after the death of her husband refused to deliver them to his administrator, claiming them as her own separate property. *Held*—That if she intended to repudiate the contract and avoid the notes by reason of her coverture, which she could do, she should have surrendered the goods to her vendors; but that, by refusing to deliver the goods to the administrator of her husband, she rendered herself liable for the payment of their value. Judgment of the chancellor against her for the price agreed upon, and interest from the maturity of the notes, is affirmed.—*Hunter vs. Duvall, Ketchum & Co.* 438

10. After the wife had permanently abandoned her husband and his home, the husband and wife, together with a third party as her trustee, entered into articles of separation, which was duly acknowledged for record by the husband, and also by the wife and her trustee. In these articles it was recited that she had voluntarily abandoned him "*without legal cause to authorize either dower or alimony*," which recital was justified by the evidence in the case, and it was then stipulated that he should pay her three hundred dollars, and furnish her with a brick house, &c., &c., during her "chosen isolation." After the death of the husband, without devising any thing to her, she made a deed of release within the year, as provided in section 7, chapter 47, Revised Statutes, and asserted her claim to dower in his estate. *The judgment of the circuit court refusing dower is affirmed.—Loud vs. Loud, &c.* 453

11. Articles of separation being entered into with a trustee consenting for the wife, in which the husband provides for her as well, or perhaps better, than the court would compel him, in consideration of which she relinquishes right of dower and distribution in his estate, and the parties continue to act upon this until the husband dies, it is too late for her to complain or seek to repudiate the provision made for her, and demand dower and distribution. *See opinion for an extended recital and review of authorities on questions involved in this case.—Ib.* 453

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HUSBAND AND WIFE—Continued.

12. TENANTS BY THE ENTIRETY.—A conveyance of land to husband and wife and their heirs, before the Revised Statutes took effect, as at common law, constituted an estate by entireties, which neither husband nor wife could sever, or make liable for debts as against the other. Death terminates the title, in such estates, of the first one dying, and the survivor acquires no new or additional title from the decedent, but holds the entire estate under and by virtue of the original conveyance.—*Elliott, &c., vs. Nichols, &c.* ---------- 502

13. In conveyances of land to husband and wife, made since the Revised Statutes took effect, as therein provided, "*unless a right by survivorship is expressly provided for, there shall be no right to the entirety by survivorship between them*, but they shall take as tenants in common, and the respective moieties, be subject to curtesy or dower, with all other incidents to such a tenancy." (*Sec.* 14, *art.* 4, *chap.* 47, *Revised Statutes*, 2 *Stanton*, 27.) This change in the rule of the common law is not retrospective, and does not apply to conveyances made before the Revised Statutes took effect.—*Ib.* ---------- 502

14. As the entire title and estate was vested in both the husband and the wife *as tenants by entireties*, the legislature could not have averted any portion of the title.—*Ib.* ---------- 502

15. The husband's right to his wife's choses in action accruing to her during coverture, is contingent and merely potential. If not reduced to possession during his life, they survive to the wife, *sus jure*.—*Dunn vs. Lancaster* ---------- 581

16. The husband's assignment of his wife's choses in action, is not, *per se*, a reduction of them to possession. The assignee holds, as the husband did, subject to the wife's contingent right of survivorship, or to an equitable settlement, if not reduced to possession before his death. (*Story's Equity*, *secs.* 1411, 1412; *Perdew vs. Jackson*, 1 *Russell*, 63-4; *Bruce vs. Dennison*, 6 *Ves.*, 394; *Roper on Husband and Wife*, 509 *to* 522, *addenda No.* 3; *Pierce vs. Thornly*, 2 *Sim. R.*, 167; *Ellison vs. Elwyn*, 13 *Sim.*, 309; *Horner vs. Morton*, 3 *Russell's R.*, 65; *Hord vs. Hord*, *&c.*, 5 *B. Mon.*, 84-5; *Lynn vs. Bradley*, *&c.*, 1 *Met.*, 234.)—*Ib.* ---------- 581

17. By the husband's assignment of his wife's legacy, the assignee took the husband's right, and acquired no more. That right was contingent, and depended on the reduction of the legacy to possession during the husband's life. As the legacy, payable in five years, was not due and demandable at the time of the husband's death, there was no such

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HUSBAND AND WIFE—Continued.

reduction, nor could have been, unless the executor had anticipated the time of payment prescribed by the testator, which he rightfully refused to do.—*Ib.* ---------- 581

18. The coverture of the wife protects her from the legal obligation resulting from her signature to her husband's assignment of her legacy, which was in the hands of the executor of her father. The legacy not being due or demandable, was a suspended chose in action (*Story's Equity, sec.* 1413; *Hord vs. Hord, &c.*, 5 *B. Mon.*, 85, *and cases therein cited*), subject to the contingency of reduction to possession in the husband's lifetime, and not being so reduced, it survived to the wife.—*Ib.* ---------- 581

19. A surviving husband, who never had actual seisin during the life of his wife, is not entitled to curtesy in her lands. At her death, her heirs-at-law became entitled to possession.—*Conner and wife vs. Downer, &c.* ---------- 631

INDEMNIFYING BONDS—

1. In order to protect himself from responsibility by taking an indemnifying bond, the officer must take the bond before the sale is made, and he should return it to the proper officer whence the execution issued. (*Civil Code, secs.* 709, 710, 711.) A bond taken after the sale does not constitute a protection to the officer, if he were otherwise a trespasser.—*Carrington vs. Herrin, &c.* ---------- 624

INDICTMENT—

1. The grand jury, under section 36, article 4, of the Constitution, has jurisdiction to return an indictment against a jailer "*for permitting the jail to become so filthy as to endanger the comfort, health, and lives of the prisoners.*"—*McBride vs. Commonwealth* ---------- 331

2. An order of the court abating an indictment on motion of the Attorney for the Commonwealth, although superinduced by the mistaken belief that the defendant was dead, was a termination of the prosecution on said indictment, and it could not be reinstated on the docket as a pending indictment against such defendant. This indictment having been reinstated on the docket, there was no prosecution pending against the defendant. Being arrested, the defendant was not legally in custody, charged with a public offense; and having given a bail bond, his sureties are not liable for his non-appearance.—*Henry vs. Commonwealth* ---------- 427

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INDICTMENT—Continued.

3. On the trial of an indictment for keeping a "tippling-house" in the city of Louisville, the only proof before the jury was, that spirituous liquors had been drank in the house "*more than twice*," and that the defendant had a State license to retail such liquors, and had also paid for, but had not obtained, a city license. On these facts the jury was instructed in effect to find the defendant guilty. *Held*—That the instruction was erroneous, and the verdict against the defendant was not authorized by the testimony; that this court has no judicial knowledge of any ordinance requiring a city license, and no such ordinance was shown; nor did the testimony, in such a penal case, authorize the deduction that the liquor drank in the defendant's house was drank with his consent, or was sold by him.—*Lucker vs. Commonwealth* ---------- 440

INFANTS' REAL ESTATE, SALES OF—

1. Infants' real estate having been sold by irregular proceedings under the provisions of chapter 86, Revised Statutes, the guardian of such infants may file additional pleadings, to correct and cure the irregularities, and he may also execute the proper covenants, under the provisions of an act, to enlarge the jurisdiction of the Louisville chancery court, approved February 26, 1868. When all defects in the original proceedings are cured, the interest of the infants being promoted thereby, the sales should be confirmed, and the motion of the purchasers to set the sales aside should be overruled, whether made before or after the passage of said enabling act; but the purchasers in this case are not required to pay interest during the time required to perfect the title to them. The act above referred to is held to be constitutional.—*Marshall vs. Marshall* ---------- 248

2. In the absence of a statutory guardian, the public guardian could take control of suits which he might find pending and not prosecuted for the want of a statutory guardian.—*Ib.*------ ---------- 248

3. *In a petition to sell the lands* of heirs, any one of whom is an infant, or of unsound mind, a married woman, or resides out of the State, under article 1, chapter 86, of the Revised Statutes, *the authority of the court to adjudge the sale depends on the existence of the particular facts named in the statute. It is necessary to allege and prove, that the share of each heir is not of greater value than one hundred dollars.* For the want of such proof in this case, the judgment of sale is reversed on the appeal of one of the heirs, a married defendant, to the petition.—*Gardner and wife vs. Craddock, &c.* ---------- 370

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INFANTS' REAL ESTATE, SALES OF—Continued.

4. The "*Act to revive and continue in force acts and amended acts, to amend the third and fifth articles of chapter eighty-six, Revised Statutes,*" approved January 12, 1866 (*Myers' Sup.*, 750), *has both a retroactive and prospective operation.—Mahoney, gd'n, vs. McGee* 527

5. When the proceedings for the sale of infant's real estate, under chapter 86, have been irregular, said act gives to the chancellor power, when he ascertains that it would be right, by proper proceedings, to mature, perfect, and sustain the sale, and secure to the purchaser the land he bought, and to the ward the price bid, and thereby prevent injustice to either party.—*Ib.* 527

6. When the guardian offered to file an amended petition, making the necessary allegations and the proper parties, for the purpose of curing any defects in the proceedings, for the sale of his ward's land, the circuit court erred by sustaining the purchaser's exceptions to the sale, and also, by sustaining a demurrer to the amended petition of the guardian. (*Boyce and wife vs. Sinclair*, 3 *Bush*, 264.)—*Ib.* 527

INJUNCTIONS—

1. Although an interlocutory order merely dissolving an injunction, is not a final decree, revisable by the Court of Appeals, yet a judgment for damages on the dissolution, is final, and may be enforced by execution *pendente lite;* consequently, when the amount of damages will authorize an appeal, the Court of Appeals has jurisdiction alone to correct it.—*Offut's ex'x vs. Bradford, &c.* 413

2. On the dissolution of an injunction sued out by an executrix for her own benefit as devisee, the judgment for damages was properly rendered against her personally, and not against the assets.—*Ib.* 413

3. An injunction against the creditors of a decedent, cannot be sued out more than three years after the qualification of the personal representative. (*Civil Code, sec.* 472.)—*Ib.* 413

INSURANCE—

1. If the assured procures another insurance on the same property without having it indorsed on the first policy as therein required, the first insurer may avoid his contract and policy.—*Baer vs. The Phœnix Insurance Company* 242

2. "*Void,*" as recited in an insurance policy—*that if the same property had been or should be insured by any other company, without an indorsement thereof on this policy, its guaranty should be void, &c.*—"*void,*" in such

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INSURANCE—Continued.

connection, means *voidable*, or *to be treated as void* by the insurer at his own exclusive option. Such violation of the policy by the insured did not render the policy an absolute nullity as to either party. The insurer might, by contract or conduct, waive the right to exoneration and become estopped from enforcing the conventional condition of forfeiture.—*Ib.* 242

3. The assessment of a loss cannot be construed as more than a prelude to the ulterior decision by the insurer to pay or not to pay on full knowledge of all the preliminary facts, &c. The simple assent to the appraisement could not consistently imply a waiver of forfeiture, and especially as the ground of it was not then known to the insurer. *Ib.* 242

4. An insurance company is responsible for injury done to eight mules prudently stationed on a steamboat, by an escape of steam on the boat from an unknown cause, without the fault of the officers of the boat. This injury is held to have been caused by one of the perils of the river covered by the policy on the mules.—*Union Insurance Company of Louisville vs. Groom* 289

5. "Perils of the sea," or of "the river," as insured against in marine policies, are generally understood to mean dangers peculiarly incident to the insured goods on that element in the craft used for their transportation, and to which they would not be liable on land.—*Ib.* 289

6. A party, who was insured against accidents, "inadvertently put his arm a short distance out of the window of a railroad car, when his hand came in contact with a post standing near the track of the road, whereby the middle finger of his right hand, was so badly injured as to render him wholly unable to practice his profession, of surgeon, for the period of twenty-six weeks or more." *Held*—That the injury was produced by the fault of the assured, and he thereby deprived himself of all right to compensation.—*Morel vs. Mississippi Valley Life Insurance Company* 535

JAILERS—

1. Allowances made by county courts to jailers for fees and services as such, cannot be attached in the hands of the sheriff.—*Webb vs. McCauley* 8

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JAILERS—Continued.

2. Fees and allowances to jailers being necessary, and provided by law, to enable them to discharge their official duties, public policy will not permit a creditor to attach these fees and allowances in the hands of the sheriff.—*Ib.* ---------- 8

3. The grand jury, under section 36, article 4, of the Constitution, has jurisdiction to return an indictment against a jailer "*for permitting the jail to become so filthy as to endanger the comfort, health, and lives of the prisoners.*"—*McBride vs. Commonwealth* ---------- 331

4. Whatever may be the powers of the county judge to impose fines upon a jailer for a violation of the rules prescribed by the county court, for a willful neglect of official duty, an indictment is a proper remedy provided by the Constitution (*sec.* 36, *art.* 4); and being so provided, no legislative enactment is necessary to give the grand jury jurisdiction.—*Ib.* ---------- 331

NOTE BY REPORTER.—This case overrules *Commonwealth vs. Mitchell* (3 *Bush*, 33), so far as it is inconsistent with the opinion in this case.

5. As the judgment and conviction of the jailer on an indictment for willful neglect of official duty, in permitting the jail to become so filthy, &c., was only for a fine, the court does not say or intimate, whether the office became vacant on the judgment and conviction, by virtue of the express terms of the Constitution.—*Ib.* ---------- 331

JOINTURE—

1. The right of a wife to relinquish a jointure and claim dower in her husband's estate within twelve months after his death, as provided in section 7, chapter 47, Revised Statutes (2 *Stant.*, 26), does not embrace articles, contracts, and jointures entered into between separated husband and wife, to settle existing causes of litigation, and peaceably accomplish by private contract what could be obtained by a costly and vexatious litigation.—*Loud vs. Loud, &c.* ---------- 453

2. Articles of separation being entered into with a trustee consenting for the wife, in which the husband provides for her as well, or perhaps better, than the court would compel him, in consideration of which she relinquishes right of dower and distribution in his estate, and the parties continue to act upon this, until the husband dies, it is too late for her to complain or seek to repudiate the provision made for her, and demand dower and distribution. *See opinion for an extended recital and review of authorities on questions involved in this case. Ib.* ---------- 453

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JUDGMENT—

1. A judgment for damages is erroneous in ordering the payment of damages by reference to the bond—"*and also the ten per cent. in damages, as agreed to in the bond herein*"—without ascertaining any specific sum to be recovered.—*Smith vs. Wells' adm'x* 92

2. Having recovered a judgment by default, in 1859, against a minor for whom no defense was made, the plaintiffs, in 1865, voluntarily caused the action to be again placed on the docket, and summons served on the defendant to answer, &c. The defendant answered and defeated the action. These subsequent proceedings must be regarded as a voluntary release and abandonment of the previous judgment of 1859, which plaintiffs cannot afterwards, at their option, vivify and enforce by execution.—*Ramage vs. Clements & Gilmore* 161

3. Although the court had no power, of itself, to reinstate the action on the docket, and set aside the former judgment in favor of the plaintiffs, and retry the cause, still, by agreement of parties, the court might allow it to be done, and especially when the former judgment was voidable. The action being defeated on the second trial, the former judgment cannot afterwards be enforced by execution. In this case the circuit court erroneously refused an injunction against the enforcement of the former judgment.—*Ib.* 161

4. A failure to mention in the judgment, credits which are shown in the petition, is a clerical misprision, because the judgment could be amended by the record.—*Long vs. Gaines, Berry & Co.* 353

5. A judgment on demurrer, dismissing plaintiff's petition, is virtually a judgment, against cause of action, and must be considered a final judgment, and an appeal may be taken to reverse it.—*Commonwealth for Young vs. Peters, &c.* 403

6. The quashal of an execution, levy, and sale of land, because a credit was not indorsed on the execution, leaves the judgment in full force, and the plaintiff may take out another execution.—*Davie vs. Long's adm'x* 574

7. An erroneous judgment cannot be assailed collaterally.—*Green vs. Ball* 586

JUDICIAL SALES—

1. The purchaser of real estate, sold under a decree of the court, as prescribed by the *act of August* 23, 1862, entitled "*An act authorizing the sale of real estate and slaves in which there is a future contingent interest*" (*Myers' Sup.*, 426), by complying with the terms of the sale

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JUDICIAL SALES—Continued.

prescribed in the decree, is vested with all the title of the present and future, or contingent claimants, to said real estate.—*O'Neal vs. Banon* 23

2. The purchaser of real estate, *sold under a decree of court* for reinvestment, *cannot be prejudiced by the failure of the court* to provide for the securing and reinvestment of the proceeds of the sale, and securing the title, thus acquired to all who may be interested therein. *Ib.* 23

3. The land purchased at the decretal sale having been conveyed to the purchaser, *the assignment of the certificate of purchase*, dated anterior to the conveyance, to a third party, of itself, is no evidence as to persons not parties to the assignment when assailed as fraudulent by creditors.—*Jarboe, &c., vs. Colvin, &c.* 70

4. In decretal sales of land the commissioner *must sell* in pursuance of the decree. He must also pursue the advertisement, whether the sale be *in gross or by parcels.* (*Hahn vs. Pindell*, 1 *Bush*, 540.) For any departure from the advertisement the sale should be set aside. *Ib.* 70

5. At a decretal sale in Louisville, in 1862, of real estate belonging to parties then resident in the State of Mississippi, the purchaser, by announcing to competing bidders, that he would purchase for the owner's benefit, prevented others from bidding, and was thereby enabled to bid it off himself at much less than its value, and much less than it would have then sold for. In 1864, the purchaser sold it for more than double the amount paid for it by him. After the cessation of hostilities, the original owners brought suit to recover the property from the sub-purchaser, and also against the decretal purchaser, if they could not recover the property itself, to compel him to pay over the amount received by him, deducting the purchase price, and for an account of rents and interest. *Held*—That the sub-vendee was entitled to hold as an innocent purchaser; but that the conduct of the decretal purchaser raised an implied trust, and he was responsible for the profits made by his purchase and sale, and also for rents and interest. (*Estell vs. Estell*, 3 *Bibb*, 179; *Partlow vs. Lane*, 3 *B. Mon.*, 426.)—*Crutcher vs. Hord and wife* 360

6. In a proceeding to subject real estate situated in Kentucky belonging to enemies resident in the Confederate States during the war, the creditor being a citizen of, and the land situated in, Kentucky, so far from its sale being interdicted, the rights of the legal creditor are

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JUDICIAL SALES—Continued.

protected even against the government on a proceeding to confiscate, by section 47 of the act of Congress of March 3, 1863. (2 *Brightly's Digest*, 1238.)—*Ib.* ---- 360

7. Any one not under legal disabilities had the right to purchase the real estate situated in Kentucky, of debtors who were resident in the Confederate States, at decretal sales thereof during the war, either for his own or for the debtor's benefit, subject, as was all the property of the rebel debtor, to confiscation by the government; but not subject to be defeated in this or any other right by any one except the sovereign.—*Ib.* ---- 360

8. Legal rights and responsibilities might spring out of the conduct of the purchaser of such real estate, which, however, would remain suspended during hostilities; but on the restoration of peace, the debtor's right of action would revive, and he could enforce any legal right which existed anterior to, or was created during, the war. *Ib.* ---- 360

9. The purchaser of a house and lot in Louisville at a decretal sale, in proceedings by attachment, against an absent defendant, told one witness at the sale, that he intended to buy the property for the benefit of the owner, and if he should buy, would hold it for his use. The proof showed that the property sold for its value at the time of sale, and failed to show that the witness would have bid more than it was actually sold for. The petition for the recovery of the property, failing to allege a tender, or to make an offer of reimbursement, was dismissed by the chancellor, and that judgment is affirmed.—*Crutchfield vs. Thurman* ---- 498

10. If the appellant was wronged in the sale of his property by the purchaser, and might, if true to the Union, have a just claim to be righted by this court, his hostile attitude, in having been engaged in the Confederate service, would not affect his right to enforce an implied trust, not from contract, but from fraud. But the solitary testimony of *one witness*, however credible, is not of such a definite and unquestionable character as to establish, in this case, the alleged fraud and resulting trust, against the positive denials of the answer. *Ib.* ---- 498

11. On the appeal of the purchasers of real estate sold by order of the Louisville chancery court, in a suit wherein sundry orders and the judgment of sale were made and rendered by special or *pro tem.* chancellors, the proceedings appearing to be irregular, and infants

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JUDICIAL SALES—Continued.

and married women and non-residents being interested parties, and legally unable to consent, or waive any objection which they might legally urge, against the election and qualification of the *pro tem.* or special chancellors or other irregularities, *the judgment of the chancellor confirming the sales and ruling the purchasers to pay, is reversed,* with directions to give either party the right, within a reasonable time, by proper pleadings and proceedings, to cure any defects in the proceedings and sales, or to show any equitable reason why the sale should not be made or confirmed.—*Rudd, &c., vs. Woolfolk, &c.* ... 555

12. Although the proceedings for the sale of land for distribution were irregular, but not void, acquiescence in the sale for more than thirty years, would repel the idea of fraud or unfairness in the procurement of the judgment or decree for the sale.—*Conner and wife vs. Downer, &c.* ... 631

JURISDICTION—

1. Service of Summons out of the County.—In an action in the Grant circuit court against one defendant only, the summons was served on him in Harrison county, and judgment by default was rendered against him on three notes. No special reason for such service appearing in the record, *on defendant's appeal, the judgment is reversed. Held—That*

If any of the special causes existed, authorizing the judgment, these should be manifested, else the circuit court should have refused to have pronounced judgment; and

The defendant, knowing that no such causes existed, was not required to respond to such service, but might regard it as totally insufficient to authorize a judgment against him.

To compel the attendance of the defendant, for the purpose of objecting, would be to expose him to the unnecessary trouble and expense of a litigation in a distant county, and reinstate the evils intended to be remedied by the Code; and

As the defendant had the right to appear in the circuit court and object to its further proceedings on such service, and had the right to appear in the Court of Appeals for the same purpose, he cannot be proceeded against because thereof; and unless some special cause for the service in Harrison county shall appear, or the appellant should waive his right to object, the circuit court should, on the return of this case, refuse to adjudge against him, until proper service of process. (*Civil Code, secs.* 107, 110; *Randall vs. Shrop-*

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JURISDICTION—Continued.

shire, 4 *Met.*, 327; *Raymond vs. Reed*, 16 *B. Mon.*, 350; *Ruby vs. Grace*, 2 *Duvall*, 540.)—*Dyas vs. Lindsey* 349

2. *In a petition to sell the lands* of heirs, any one of whom is an infant, or of unsound mind, a married woman, or resides out of the State, under article 1, chapter 86, of the Revised Statutes, *the authority of the court to adjudge the sale depends on the existence of the particular facts named in the statute. It is necessary to allege, and prove, that the share of each heir, is not of greater value than one hundred dollars.* For the want of such proof in this case, the judgment of sale, is reversed on the appeal of one of the heirs, a married defendant, to the petition.—*Gardner and wife vs. Craddock, &c.* 370

3. The court, whence an execution issued, which was directed to the sheriff of another county, has no jurisdiction of an action against such sheriff for his failure to make levy and return of such execution, as required by law. The cause of action occurred in the county of which the defendant was sheriff, and the courts of that county have jurisdiction. (*Civil Code, sec.* 94.) *Sections* 3 *and* 4, *article* 18, *chapter* 36, *Revised Statutes* (1 *Stanton*, 493), giving jurisdiction in such cases to the courts whence the executions issued, are repealed by the provisions of the Code which were subsequently adopted. (*See Civil Code, secs.* 748, 875, *and* 908.)—*Groom's adm'r vs. Pickett, &c.* ... 372

4. In an action in equity in the Livingston circuit court against the steamboat Hyatt and owner, on a note given by him at Evansville, Indiana, for boilers furnished his boat and repairs of its engine, on a special contract made by the owner, *the boat being attached*, the circuit court properly rendered a personal judgment against the defendant, and also for enforcing the asserted lien on his boat.—*Steamboat Hyatt and owner vs. Reitz & Haney* 395

5. Maritime contracts made on the sea, or any of its tributaries, not within the jurisdictional limits of any State, always operate *in rem;* and contracts for repairs or supplies of a ship or boat, at the instance of the master only, and not at its home port, are made *ex necessitate* on the credit of the vessel, and, therefore, imply a lien on it; but—*Ib.*.. 395

6. When the contract for repairs or supplies of a vessel, is made in the home port, or by the owner himself, there or elsewhere, it is presumptively made on his personal credit alone, and does not imply a lien on his vessel; and this latter class of contracts are not, in the constitutional sense, maritime, so as to give jurisdiction to the Federal courts, but all depend on the common law, and are remediable

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JURISDICTION—Continued.

in the State courts, according to the local laws which guide and govern them.—*Ib.* ---------- 395

7. The courts of Kentucky will not abate a suit, on a plea of the pendency of a prior suit, on the same debt and between the same parties, in a court of another State.—*Davis vs. Morton, Galt & Co.* ---------- 442

8. As between themselves the States of this Union, though integral parts of the same national sovereignty, are yet foreign to, and independent of, each other.—*Ib.* ---------- 442

9. A plea to the jurisdiction of the circuit court, after a defense to the merits of the action, unless for want of jurisdiction, over the subject-matter of the action, comes too late.—*Baker vs. Louisville and Nashville Railroad Company* ---------- 619

10. A defense to the merits of an action amounts to a waiver of the objection to the jurisdiction, over the person of the defendant.—*Ib.*... 619

11. In an action on contract in the Warren circuit court, against the Louisville and Nashville Railroad Company, objection to the jurisdiction, because it did not have its principal office or place of business in that county, and that its chief officer did not reside therein, is waived, by answer to the merits of the action.—*Ib.* ---------- 619

12. When the residence of the chief officer of a corporation, created by the laws of this State, and its principal office and place of business are not in the county in which a transitory action is brought against such corporation, unless these facts appear in the petition, objection to the jurisdiction of the court, over the person of the defendant, cannot be made by demurrer. *Such objection must be made by plea; but after answer to merits of the action, such plea, cannot be maintained. Ib.* ---------- 619

13. The court cannot judicially know that the residence of the chief officer of a corporation, or its principal office or place of business, is not in the county in which an action is brought against such corporation. (*Civil Code, sec.* 101.)—*Ib.* ---------- 619

14. An action against the sheriff and his sureties, for failing to pay over money collected by him *on an execution, from another county*, must be brought in the county in which the sheriff qualified. (*Civil Code, section* 94.)—*Foster, &c., vs. Wade, &c.* ---------- 628

15. *The court whence an execution issued*, which was directed to the sheriff of another county, *has no jurisdiction* of an action against such sheriff and his sureties, for his failing to pay over money collected by him

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JURISDICTION—Continued.

on such execution. That part of section 3, article 18, chapter 36, of the Revised Statutes, conferring jurisdiction on the court whence the execution issued in such cases, was repealed by the Civil Code, as the same took effect July 1, 1854.—*Ib.* ---------- 628

16. The original Civil Code took effect August 1, 1851. The Revised Statutes took effect July 1, 1852, and repealed the Code, so far as inconsistent with the Revised Statutes. But the Civil Code, as revised, amended, and completed by the commissioners, and adopted by the act of February 25, 1854, took effect July 1, 1854, and *repealed all laws coming within the purview of its provisions.* (*See Civil Code, secs.* 748, 908.)—*Ib.* ---------- 628

17. After July 1, 1854, the Civil Code prevailed over the provisions of the Revised Statutes coming within the purview of the provisions of the Civil Code.—*Ib.* ---------- 628

JUSTICES OF THE PEACE—

1. If a justice of the peace presides at more than one examining court on the same day, he is entitled to the two dollars per day for each case, to be paid out of the Treasury. (*Revised Statutes, Myers' Supplement,* 155-6.)—*Johnson vs. Auditor* ---------- 321

LANDLORD AND TENANT—

1. A landlord does not waive his exclusive lien for rent upon his tenant's property by taking personal security for the rent. The acceptance of such personal security is not inconsistent with the lien conferred by the statute.—*Smith vs. Wells' adm'x* ---------- 92

2. A surety in a tenant's bond for rent may take up the bond, and have it assigned to him, so as to substitute him to all the rights and liens of the landlord.—*Ib.* ---------- 92

3. Sale under an execution-levy, on property of a tenant upon which his landlord has a lien for rent, may be suspended by the landlord, or by the surety of the tenant in his bond for the rent, by executing bond as provided in section 713 of the Civil Code. On such bond, when the property levied on is not sufficient to pay the rental, the plaintiff in the execution is not entitled to any judgment.—*Ib.* ---------- 92

4. In the lease of a plantation in Mississippi by parties in Louisville, Kentucky, by telegrams, nothing being said as to the time at which the rental was to be paid for the year 1866, the time of payment of rental, is determined and fixed by the law and customs of Mississippi. By these laws and customs, as proven in this case, the rental

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LANDLORD AND TENANT—Continued.

is required to be paid at the beginning of the yearly lease, unless expressly covenanted otherwise.—*Calhoun vs. Atchison, &c.* 261

5. The landlord having leased his land, the lessees failing to cultivate the same, the landlord cultivated a portion thereof. The lessees are entitled to a credit for the *pro rata* value of that portion which was cultivated by the landlord.—*Ib.* 261

6. A contract to pay a stipulated sum of money for the rent of a house and lot, and also to make certain improvements therein specified, *is not assignable in law so as to vest the assignee with a right to sue in his own name alone.* The assignor is a necessary party plaintiff or defendant. (*Sec. 6, chap. 22, Revised Statutes*, 1 *Stanton*, 268; *Marcum, &c., vs. Hereford*, 8 *Dana*, 1.) The assignee being the equitable holder, the assignor still holding the legal title, each is an essential party. (*Gill vs. Johnson*, 1 *Met.*, 449; *Lytle vs. Lytle*, 2 *Met.*, 127.)—*Hicks & Gill vs. Doty* 420

7. The mere fact that a tenant remains in possession after the expiration of his lease cannot be construed into a refusal to deliver possession. (*Shepherd vs. Johnson*, 2 *Bush*, 176.)—*Thompson vs. Marsh*..... 423

8. A judgment for double rent is unauthorized when the evidence fails to show that there was a demand, and a refusal to restore the possession of the premises, after the termination of the lease, or some act of the tenant equivalent to an express refusal. In this case, such a judgment is reversed, although no exceptions were taken to certain rulings of the circuit court which are inconsistent with the conclusions of this opinion.—*Ib.* 423

9. Persons in possession of land not as tenants of any one, took leases from and held under the claimant, who asserted title to the land. Their possession from thenceforward was the possession of their landlord, and they would be estopped to deny his title, and, without renunciation and notice, their possession could not become adverse to such landlord.—*Patterson, &c., vs. Hansel, &c.* 654

LIENS—

1. Attorneys have a lien upon claims in their hands for collection, both before and after judgment, for reasonable compensation for services, whether the amount of the fee has been agreed by the parties or not. (*Act of January* 26, 1866, *Myers' Supplement*, 685.) *Stephens & Hermes vs. Farrar Brothers* 13

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LIENS—Continued.

2. Each partner has a lien on the firm property. The creditors of the firm are entitled to that lien, by equitable substitution; and that lien, by subrogation, is paramount to attachment liens, created on debts which are not partnership debts.—*O'Bannon & Bashaw vs. Miller & Hopkins* 25

3. A landlord does not waive his exclusive lien for rent upon his tenant's property by taking personal security for the rent. The acceptance of such personal security is not inconsistent with the lien conferred by the statute.—*Smith vs. Wells' adm'x* 92

4. The unpaid purchase price of land being specifically recited in the deed *as two notes executed by a third person* to a third person, these third persons not being parties to the conveyance, and the notes not secured by a lien expressly reserved in the deed; on the question, did a constructive lien result under the statute (*sec.* 26, *chap.* 80, 2 *Stant.*, 230), *the court was equally divided.—Pack vs. Carder, &c.* 121

5. When the note of a third party is taken as part of the purchase price of land conveyed by deed, in which a lien is not expressly reserved to secure the note; whilst the court is equally divided on the question of lien, all the judges concur in the opinion that the holder of the note is bound to use due diligence to collect it; and if the note is not collected for want of such diligence, whether it is secured by lien or not, the loss must fall upon the holder, who was guilty of the laches resulting in its non-collection.—*Ib.* 121

6. It was agreed that the vendor should have a lien for the unpaid purchase money; the draftsman was so instructed to write the deed, and he and the parties thought it was so written; but, in matter of fact and law, it was not so written. On the evidence of the draftsman the deed is reformed so as to reserve the lien, and then the lien is enforced.—*Worley vs. Tuggle, &c.* 168

7. The statute requires the amount of unpaid purchase price to be specified in the deed of conveyance, else the vendor's lien is thereby waived; but as between the original parties or volunteers under them, this was never intended either to work a fraud or to alter the rules of evidence, nor to take from the chancellor one of his most valuable jurisdictions.—*Ib.* 168

8. It is essential to the existence of a pledge that the pledgee should have actual or constructive possession of the property pledged; but—*Petitt & Co. vs. First National Bank of Memphis* 334

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LIENS—Continued.

9. To constitute a valid lien by a pledge of property, it is not necessary that the legal title should be transferred, as in case of a mortgage; on the contrary, the title generally remains in the pledgor. (2 *Parsons on Contracts, page* 113.)—*Ib.* ---------- 334

10. Property *in transitu* may be pledged by the delivery of bills of lading therefor. Such delivery of the bills of lading is considered as a constructive or symbolical delivery of the property. A lien is created by such a pledge and delivery.—*Ib.* ---------- 334

11. Shippers of cotton from Memphis, Tenn., to Boston, Mass., drew drafts upon their consignees, and discounted them in bank at Memphis, by pledging the cotton, by a delivery of the bills of lading therefor; the cotton was subsequently attached *in transitu* at Louisville, Ky., by creditors of the shippers. *Held*—That the bank had a lien which had preference over the attachment liens.—*Ib.* ---------- 334

12. The lien reserved in a conveyance of land to secure purchase notes is only a mere security, a mere incident to the debt, which is the principal, and cannot be enforced if the debt itself, is paid or barred by time.—*Vandiver, &c., vs. Hodge, adm'r* ---------- 538

13. *The recital in a deed for land*, of what part of the consideration remains unpaid, as required by section 26, chapter 80, Revised Statutes (2 *Stanton*, 230), *is equivalent to an express lien reserved in the deed itself. The object of such recital is to secure a lien* in this statutory mode, and, consequently, when a lien is thus secured, no other cotemporaneous and collateral security can neutralize or defeat it any more than if it had been more expressly and explicitly reserved.—*Beyland vs. Sewell and wife* ---------- 637

14. Beyland sold land in Campbell county, Kentucky, to J. W. Sewell and Harriet Sewell, his wife, and conveyed the same to Harriet Sewell, as recited in the deed, "*for and in consideration of twelve thousand nine hundred dollars, being two notes of D. S. Ogden, drawn by him to his own order, one for the sum of six thousand four hundred and thirty-two dollars and twenty-eight cents, the other for six thousand four hundred and sixty-eight dollars and seventy-six cents, of date May 1st*, 1865, *due respectively in five and six months, to him transferred by Harriet Sewell.*" These bills, payable at Ocean Bank, New York, where Ogden lived, were duly presented, and protested for non-payment. *Held*—That the above recital of the consideration cannot be consistently construed as an acknowledgment of payment by an

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LIENS—Continued.

acceptance of the bills haphazard, as actual payment, and not as a mode of payment; that the deed reserved a lien unaffected by the bills, even if they were taken as collateral security; and that Beyland, holding a lien and offering to return the barren bills, the circuit court erred in dismissing his petition for enforcing his lien.—*Ib.*, 637

15. *A lien for purchase money*, reserved by a vendor in a conveyance to his vendee, is not such an encumbrance as is embraced in, and provided for by, section 1, article 15, chapter 36, Revised Statutes (1 *Stanton*, 488), regulating sales of encumbered property under execution.—*Bondurant vs. Owens* 662

16. The said provisions of the Revised Statutes regulating sales of encumbered property under execution *do not apply to vendor's liens which were not created by "mortgage, deed of trust, or otherwise,"* after the vendee became possessed of the legal title.—*Ib.* 662

17. The vendee's legal title to land, which is encumbered by a lien for unpaid purchase money reserved in his vendor's conveyance, is subject to levy and sale under execution by virtue of section 1, article 13, Revised Statutes (1 *Stanton*, 482).—*Ib.* 662

18. The purchaser, under execution sale of land so encumbered by a vendor's lien, acquires all the title of the execution defendant subject to the vendor's lien; and in case the land sold for less than two thirds of its valuation, also subject to the right of redemption within one year. The purchaser having received the sheriff's deed, by paying off the vendor's lien, becomes possessed of the absolute title to the land, and the execution defendant has no right of redemption under section 1, article 15, chapter 36, Revised Statutes.

So far as this case is inconsistent with Hinton vs. Mitchell, &c., 1 *Duvall*, 382, the latter is overruled.—*Ib.* 662

LIMITATION—

1. The statute of limitations does not commence to run against a surety *when he replevies the debt* of his principal; but it commences to run against him *when he pays the debt.—Hikes vs. Crawford & Long*.. 19

2. A payment of a debt barred by the statute of limitations, can never be recovered back on a plea of mistake of law or fact, when there was an honorary obligation to pay; and the law would rather presume that, therefore, payment would have been made, had there been no mistake as to the bar.—*Hubbard vs. City of Hickman* 204

3. An injunction against the creditors of a decedent, cannnot be sued out more than three years after the qualification of the personal representative. (*Civil Code, sec.* 472.)—*Offut's ex'x vs. Bradford, &c.*.. 413

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LIMITATION—Continued.

4. The act of May 31, 1665, to take effect May 31, 1866 (*Myers' Supplement*, 295), providing that the provisions of chapter 63 of the Revised Statutes, entitled "*Limitations of Actions and Suits*," shall extend to and embrace all cases, whether the right of action accrued before or after the Revised Statutes took effect, *as it left twelve months for suing on pre-existing causes of action, is constitutional.—Vandiver, &c., vs. Hodge, adm'r* 538

5. The unanswered plea of the statute of limitations, is a *prima facie* bar to a judgment on notes executed in 1848, for land, the cause of action having existed more than fifteen years before the commencement of the suit, and the notes being secured by a lien reserved in the conveyance; as no action can be maintained on the notes, the lien cannot be enforced.—*Ib.* 538

6. The lien reserved in a conveyance of land to secure purchase notes is only a mere security, a mere incident to the debt, which is the principal, and cannot be enforced, if the debt itself is paid, or barred by time.—*Ib.* 538

7. The period within which an action for the recovery of real property may be brought, *shall not, in any case, be extended beyond thirty years* from the time at which the right to bring the suit first accrued to the plaintiff, or the person through whom he claims, *by reason of any death or the existence or continuance of any disability whatever.* (*Revised Statutes, section* 5, *article* 1, *chapter* 63, 2 *Stanton*, 124.)—*Conner and wife vs. Downer, &c.* 631

8. In limitations to actions for mistakes, *the statute runs from the discovery, or from such time as, by the exercise of ordinary diligence, the mistake ought to have been discovered.—Dye vs. Holland* 635

9. An action to recover for a deficiency of forty-one and three fourths acres in a tract of land sold in gross, which, by mistake, was estimated at two hundred acres, when it contained only one hundred and fifty-eight and one fourth acres, *must be brought within five years* of the date of the sale, or within five years after the deficiency or mistake ought to have been discovered by the exercise of ordinary diligence. In this case, the plea of the statute of limitations is sustained. (*Grundy's heirs vs. Grundy, &c.*, 12 *B. Mon.*, 271.)—*Ib.* 635

10. When the statute of limitations has commenced to run against the ancestor in his lifetime, it will continue to run against his infant heirs, who would take the land under his will as purchasers, and not by descent.—*Patterson, &c., vs. Hansel, &c.* 654

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LIMITATION—Continued.

11. It is only where all the plaintiffs are under disabilities that the running of the statute of limitations is prevented. (*Smith, &c., vs. Carney, &c.*, 1 *Littell*, 296.)—*Ib.* ---- 654

12. The limitation of seven years does not begin to run until the tenant relying on the statute has acquired a legal or equitable title, deducible from the Commonwealth. (*Neale vs. Robertson*, 5 *J. J. M.*, 213.) *Ib.* ---- 654

LOUISVILLE CHANCERY COURT, *PRO TEM.* CHANCELLORS OF—

1. The act of January 17, 1854 (2 *Stanton*, 534), authorizing the members of the bar to elect chancellors *pro tempore*, from time to time, for the Louisville chancery court, as emergencies may require, is constitutionally valid.—*Rudd, &c., vs. Woolfolk, &c.* ---- 555

2. The reasons for electing a special judge of a circuit court or a chancellor *pro tempore* of the Louisville chancery court, and the fact of taking the required oath, shall be entered on the order book. On appeal, this order need not be copied in the record, but will be presumed to be correct; but when it is copied, and thereby no qualification appears, the presumption of correctness is rebutted.—*Ib.* ---- 555

3. Consent to the special judge or chancellor *pro tempore*, will be presumed as between the original parties to the record, before the court on actual service of process, and who are not under disabilities, but only as to them. Consent cannot be presumed against parties only constructively before the court, nor against minors or married women, nor against purchasers, who are not parties to the original record.—*Ib.* ---- 555

4. On the appeal of the purchasers of real estate, sold by order of the Louisville chancery court, in a suit wherein sundry orders and the judgment of sale were made and rendered by special or *pro tem.* chancellors, the proceedings appearing to be irregular, and infants and married women and non-residents being interested parties, and legally unable to consent or waive any objection, which they might legally urge against the election and qualification of the *pro tem.* or special chancellors or other irregularities, *the judgment of the chancellor confirming the sales, and ruling the purchasers to pay, is reversed*, with directions to give either party the right, within a reasonable time, by proper pleadings and proceedings, to cure any defects in the proceedings and sales, or to show any equitable reason why the sale should not be made or confirmed.—*Ib.* ---- 555

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MANDAMUS—

1. On motion for mandamus against the Auditor to compel him to draw his warrant upon the Treasury to pay plaintiff a balance claimed for materials furnished and work done on public buildings under a contract with the State Librarian, it does not appear from the petition whether the work was done under a contract made by the directions and advice of the Governor or not; and as the petition alleges that the plaintiff was employed by the Superintendent to do the work, and does not disclose that the contract was not in writing, it must be presumed that the officers did their duty in the absence of facts to sustain a contrary conclusion. Such facts not being apparent on its face, the circuit court erred by sustaining a demurrer to the petition.) *See Revised Statutes, sec.* 1, *art.* 2. *chap.* 78, *and art.* 1, *chap.* 16.)—*Haly vs. Auditor*..... 490

MARRIAGE—

1. A marriage, valid in the country where celebrated, is held to be valid in other countries where the parties may be domiciled, though it would have been invalid, by the law of the subsequent domicil, if it had been originally celebrated there. Polygamous and incestuous marriages are exceptions to this rule.—*Dannelli, &c., vs. Dannelli's adm'r*..... 51

2. Before the marriage of a man to his brother's widow in Switzerland would be pronounced invalid by the courts of Kentucky, the laws of Switzerland making it invalid, should be made known in a legal form—as both reason and authority regard the assent of the parties and the consummation thereof, by cohabitation, as a legal and valid marriage, unless prohibited by the municipal laws of the country where celebrated.—*Ib.*..... 51

3. A valid marriage puts an end to illicit intercourse (23 *New York Reports*, 95), and rebuts the presumption of continuous illicit conduct arising from previous illicit cohabitation.——*Ib.*..... 51

4. The declaration of parties, if deceased, that they were married, provided they were made, *ante litem motam*, are admissible of the fact declared. Such declarations made by parents in life, are admissible as evidence to establish the legitimacy of their issue. (*Goodnight vs. Moss, Cowp.*, 591, *and cases cited.*)—*Ib.*..... 51

5. The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite ex-

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MARRIAGE—Continued.

planations, courts are bound to assume it to be moral rather than immoral, and credit is given to the assertion of parties, whether express or implied, of a fact peculiarly within their own knowledge. *Ib.* ---------- 51

6. The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy, and in the absence of evidence to the contrary a child *eo nomine* is therefore legitimate. (2 *Hogg C. R.*, 197; 4 *Eng. Eccl. R.;* 13 *Ves.*, 145; 23 *N. Y.*, 107.)—*Ib.* ---------- 51

7. The presumption of legitimacy is not lightly repelled by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory, and conclusive.—*Ib.* ---------- 51

8. By the laws of Kentucky actual marriage and subsequent recognition would legitimate a child born before the marriage.—*Ib.* ---------- 51

MASTER AND APPRENTICE—

1. An order of the county court, binding a child as an apprentice, should *exhibit the facts required by law*, for giving jurisdiction to the court. If these facts are not stated in the order, *it is void.* (*Small vs. Small*, 2 *Bush*, 45; *Freeman vs. Strong, &c.*, 6 *Dana*, 283.)—*Chaudet vs. Stone* ---------- 210

2. In apprenticing negro or mulatto orphan children, it is the duty of the county court under the act of February 16, 1866 (*Myers' Supplement*, 729), to give the preference to the former owner, if he requests it, provided he is a suitable person.—*Lamb, &c., vs. Lamb* ---------- 213

MISCONDUCT OF PLAINTIFF OR HIS ATTORNEY—

1. *If the plaintiff or his attorney*, before judgment, either directly or indirectly, puts a party who is not liable for the debt sued on, off his guard, or prevents him from defending the action, such conduct would entitle the injured party to relief.—*Hayden, &c., vs. Moore*, 107

MISTAKES—

1. When, by mistake, oversight, or fraud, the deed or written memorial does not conform to the real contract of the parties, the chancellor can reform the deed or written memorial on satisfactory parol evidence, and then enforce a specific performance according to the real contract. In all such cases, if the mistake, oversight, or fraud, is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties, and then enforce it.—*Worley vs. Tuggle, &c.* ---------- 168

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MISTAKES—Continued.

2. The evidence of the draftsman alone, since the adoption of the Civil Code, is sufficient to establish the allegation of *mistake*, though denied in the answer. (*Civil Code, sec.* 142.)—*Ib.* 169

3. The rule which required two witnesses or one witness, and strong corroborating circumstances, to overcome a denial in an answer in chancery, has been changed by the Civil Code, section 142. (*Albro vs. Lawson*, 17 *B. Mon.*, 644; *Enders vs. Williams*, 1 *Met.*, 354–5.)—*Ib.* 169

4. A payment of a debt barred by the statute of limitations, can never be recovered back, on a plea of mistake of law or fact, when there was an honorary obligation to pay; and the law would rather presume that, therefore, payment would have been made, had there been no mistake as to the bar.—*Hubbard vs. City of Hickman* 204

5. A father intending to convey land to his married daughter and the heirs of her body, through mistake, conveyed it to her husband and his heirs. This deed is reformed after the death of both grantor and grantee, upon clear and satisfactory evidence.—*Mattingly and wife vs. Speak, &c.* 316

6. To authorize the chancellor to annul or modify the terms of a conveyance, or other written instrument, on the ground of mistake, as to its contents or legal effect when executed, *such mistake must be established*, and *must not be a mere inference, from the weight of evidence.*—*Ib.* 316

7. An action to recover for a deficiency of forty-one and three fourths acres, in a tract of land sold in gross, which, by mistake, was estimated at two hundred acres, when it contained only one hundred and fifty-eight and one fourth acres, *must be brought within five years* of the date of the sale, or within five years after the deficiency or mistake ought to have been discovered, by the exercise of ordinary diligence. In this case, the plea of the statute of limitations is sustained. (*Grundy's heirs vs. Grundy, &c.*, 12 *B. Mon.*, 271.)—*Dye vs. Holland* 635

8. In limitations to actions for mistakes, *the statute runs from the discovery, or from such time as, by the exercise of ordinary diligence, the mistake ought to have been discovered.*—*Ib.* 635

MORTGAGES—

1. A mortgage upon the land, and actual dwelling and home, of the mortgagor, waives his right of exemption to a homestead, as provided in the act of February 10, 1866 (*Myers' Supplement*, 715), unless the land and homestead so mortgaged, should sell so as to pay the mortgage debts, and still leave the homestead or its equivalent in money. *Jarboe, &c., vs. Colvin, &c.* 70

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MORTGAGES—Continued.

2. The assignor of a note executed to his assignee a mortgage *providing that said assignor and the obligors in said note shall cause the same to be paid at maturity, &c.* This mortgage is not a constructive guarantee of payment upon the part of the mortgagor alone; but a security, that if the assignee should, after proceeding with due diligence, fail to obtain payment from the obligors in the note, the mortgage would assure full payment by the mortgagor, on his ultimate liability as assignor.—*Carlisle, &c., vs. Chambers* 268

3. Summons issued on the *21st day of May*, 1866, *returnable* to the first day of the *ensuing June term.* An order of attachment issued in the same action was dated *May* 21, 1866, returnable on the first day of the next term of the circuit court, and duly signed and attested by the clerk. This order of attachment was indorsed on its back, unattested, "*November term*, 1866." On the *10th day of August*, 1866, the sheriff levied this order of attachment on land. On the *25th day of August*, 1866, the owner mortgaged this same land. In a controversy between the attaching creditor and mortgagees, the court held that the *mortgagees had, but that the attacking* creditor did not have, a lien on the land.—*Peters, gd'n, &c., vs. Conway* 565

4. Subsequent attaching creditors can show defects in prior attachments, and thereby get the prior liens out of their way; and the same principle authorizes subsequent mortgagees to attack prior attachments and levies.—*Ib.* 565

NATIONAL BANKS—

1. *Shares of stock in National Banks, in Kentucky, are liable to a tax of fifty cents* on each share of one hundred dollars; and the officers of such banks can be legally compelled to pay these taxes, for their respective shareholders. This is the same tax which is imposed upon State institutions, and is collected in the same mode. (*Act of February* 9, 1865, *Myers' Supplement*, 482; *Revised Statutes, sec.* 1, *art.* 2, *chap.* 83, 2 *Stanton*, 239; *and sec.* 1, *art.* 10, *chap.* 83, 2 *Stanton*, 265.)—*Commonwealth vs. First National Bank of Louisville* 88

NEW TRIALS—

1. *Motion for a new trial in the circuit court is essential in an action wherein the issue presented by the pleadings was submitted to a jury.* The failure to make such motion precludes the appellant from the opportunity of having the errors complained of corrected in the Court of Appeals. (*Humphreys vs. Walton*, 2 *Bush*, 580.)—*Detherage vs. Montgomery*, 46

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New Trials.

NEW TRIALS—Continued.

2. The Civil Code merely regulates, but does not require, a motion for a new trial in ordinary actions.—*Union Insurance Co. of Louisville vs. Groom* ---- 289

3. A motion for a new trial is not indispensably necessary to give the Court of Appeals jurisdiction of an appeal taken from a judgment in an ordinary action, in which *both law and facts were submitted to the judge, the authenticated bill of exceptions purporting to recite all the evidence on the trial.* An intimation to the contrary in *Humphreys vs. Walton* (2 *Bush*, 580), was *obiter*, and is not regarded as authoritative or right, if it could, as we think it ought not to, be understood as intending more than that, unless such motion be made within a prescribed time, the court would not be bound, to hear it, or sign any bill of exceptions, so as to bring the case to this court.—*Ib.*---- 289

4. Substantially, there is a perfect analogy between the decision of a chancellor on the facts embodied in the record and a judgment by a common law judge on the facts spread upon the record, by bill of exceptions, and no consistent reason is perceived why a *motion for a new trial* should be required in either case, or in one and not in the other.—*Ib.* ---- 289

5. The presumption is reasonable, that if the verdict of a jury is unsustained by the facts, the presiding judge who has given no opinion on them will, on motion, grant a new trial, which is his incidental province in superintending jury trials; and, consequently, unless he has refused a new trial, the Court of Appeals will not grant it to a recusant party, who would not seek it, first in the proper forum. *Ib.* ---- 289

6. Infants and defendants constructively summoned, within the times prescribed by law, are allowed by law alternate remedies to retry the cause. *First.* By proper proceedings in the court below; *Second.* By appeal to the Court of Appeals; but they are not allowed to proceed by both remedies, and in the two courts, at the same time. (*Salter vs. Dunn*, 1 *Bush*, 311.)—*Speak, &c., vs. Mattingly, &c.* ---- 310

7. After arriving at the age of twenty-one years, the defendant prosecuted an appeal to the Court of Appeals, to reverse a judgment of the circuit court, *rendered against her during her infancy. The Court of Appeals affirmed that judgment. As to any matter which was or could have been heard on the appeal, the judgment of affirmance is a good plea in bar to a petition filed in the circuit court* to vacate or set aside the decree appealed from, whether the petition in the circuit court was filed before or after the appeal was taken.—*Ib.* ---- 310

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NON-RESIDENT ASSIGNMENTS AND RESIDENT CREDITORS—

1. A citizen of Ohio made to another citizen of that State a voluntary deed, assigning all his estate, debts, &c., everywhere, for the payment of all his own debts, without discrimination or preference, according to the laws of Ohio regulating assignments by "*insolvent debtors.*" After the date of the assignment, Kentucky creditors, in the courts of Kentucky, attached a debt due by a citizen of Kentucky to the non-resident insolvent. The attaching creditors never acceded to the assignment. *Held*—That in the courts of Kentucky the attachment liens have preference over the title and claim of the assignee.—*Johnson vs. Parker, &c.* 149

2. *Resident creditors*, having attached a debt due by a citizen of Kentucky to an insolvent debtor of Ohio, *have preference* in the courts of Kentucky over the assignee of such insolvent debtor, although the assignment was made in Ohio before the attachments were sued out in Kentucky.—*Ib.* 149

3. The principle of comity does not require the courts of one State to recognize and enforce, to the prejudice of its own citizens, assignments made by insolvent debtors under the laws of another State; but they will secure justice to domestic creditors, without regard to the foreign law and assignment.—*Ib.* 149

OBLIGOR AND OBLIGEE—

1. The obligee, when he made the contract for indulgence with the principal in the note, is presumed to have known that the other obligors were sureties, from the fact that the note was executed to himself. *Champion, &c., vs. Robertson* 17

2. It is impossible for the same person to be obligor and obligee in the same note.—*Cason vs. Wallace* 388

OFFICE AND OFFICERS—

1. The office of postmaster is incompatible with the office of county judge. *Hoglan vs. Carpenter* 89

2. By accepting or continuing to hold any office of trust or profit, under the United States, the incumbent thereby vacates any civil office in Kentucky which he holds, or to which he may be elected. (*Constitution of Kentucky, sec.* 18, *art.* 8; *Patterson vs. Miller*, 2 *Metcalfe*, 293.) *Ib.* 89

3. Whilst the acts of *a de facto officer* are good and binding as to third parties, as to himself they are null, and may be questioned by any kind of proceedings, and in all proceedings.—*Ib.* 89

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OFFICE AND OFFICERS—Continued.

4. A certificate of election, or even a commission, is not *prima facie* evidence of eligibility to the office—*Ib.* 89

5. All State, district, county, city, and town officers within this Commonwealth are required by section 1, article 8, State Constitution, to take the dueling oath therein prescribed. This oath cannot be dispensed with by legislative enactment.—*Morgan, &c., vs. Vance* 323

6. Persons deprived of the right to hold any office of honor or profit in this Commonwealth, as provided in section 20, article 8, State Constitution, by participating in a duel, or a challenge to fight a duel, *cannot, by law, be rendered eligible* to any such office. *These rights and privileges may be restored* by the pardon of the Governor, after five years from the time of the offense. (*Section* 21, *article* 8, *State Constitution.*)—*Ib.* 323

7. The power conferred upon the General Assembly to prescribe the qualifications of certain officers, as provided in sections 6 and 10, article 6, State Constitution, does not include or authorize the removal by law of disabilities imposed by the Constitution.—*Ib.* 323

8. If an officer is eligible, and has taken such oath as is required by law—the law creating the office not requiring the dueling oath prescribed in the Constitution—his acts are not void, because he did not take said dueling oath. (*Marbury vs. Madison*, 1 *Cranch*, 163; *United States vs. LeBaron*, 19 *How.*, 73; *Same vs. Stewart*, 19 *How.*, 794; *Rice, &c., vs. Commonwealth*, 3 *Bush*, 14.)—*Ib.* 323

9. If the officer be eligible, and he has taken such oaths as he supposed to be required, and regards his installation as regular, he might be deemed an officer *de jure* as well as *de facto* until a regular proceeding and judgment declaring his office vacant; but—*Ib.* 323

10. If the incumbent was ineligible, his claim to the office and discharge of its duties, however regular his installation, are no protection to him, and in a suit to hold him responsible he cannot justify under his office. (*Rodman vs. Harcourt & Carico*, 4 *B. Mon.*, 224; *Patterson vs. Miller, &c.*, 2 *Met.*, 493.)—*Ib.* 323

11. So far as the Constitution requires of all officers to take the prescribed oath, and so far as it provides disqualifications upon acts, and not upon judgment of conviction, the Constitution, as the supreme law of the land, executes itself without any extraneous aid by way of legislation, nor can its requirements be so defeated.—*Ib.* 323

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OFFICE AND OFFICERS—Continued.

12. County courts have constitutional power to remove sheriffs from office for failing to give new bonds at the time prescribed by the court, in a proceeding by notice and motion of sureties as authorized by law. (*State Constitution, sec. 9, art. 6, and sec. 19, art. 8, and sec. 2, chapter 97; Revised Statutes, 2 Stanton, 396-7.*)—*Bartly vs. Fraine, &c.*... 375

OFFICIAL BONDS—

1. "*This day came Wm. N. Peterson, who produced a certificate purporting his election as sheriff of Marshall county, and was thereupon duly sworn into office, and with R. Fletcher, P. Palmer, R. F. Stone, S. W. Harrell, James Thompson, W. B. Ely, H. Johnson, and Samuel Mathis, as his sureties, executed covenant as required by law.*" The above is a copy of the order of approval. The evidence shows that Ely went into court to sign the necessary bonds of Peterson, and did sign the county levy and revenue bonds; and as these were the only ones presented to him, he left, supposing he had signed all the bonds necessary to be executed by the sheriff. *As "W. B. Ely did not sign the general bond sued on, and as there is no county court order approving this bond without his name, it is held not obligatory on the other sureties."* *Fletcher, &c., vs. Leight, Barrett & Co.* 303

2. The county court being a court of record, can only speak by its record, especially in the absence of any issue by the pleadings of mistake or fraud.—*Ib.* 303

3. The approval by the county court of an officer's securities must appear of record. However numerous or solvent the proposed securities may be, this does not make the proposed bond official nor obligatory until the court has passed its judgment of approval; indeed, until this, it is not delivered to the Commonwealth, nor can be. It is this approval, by the tribunal designated by law, which completes its execution and delivery, and makes it obligatory.—*Ib.* 303

4. When the county court approves the proposed names and individuals as securities in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it until all the named securities sign it, than he has to accept it without the principal's signature. If he may waive the signature of one security, he may waive more, until all are waived.—*Ib.* 303

5. When the court has designated certain persons and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed

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OFFICIAL BONDS—Continued.

in conformity to the judgment of approval, else it is not the approved and accepted bond by the court; and every alteration by the clerk, either in omitting a designated party or substituting another, is wholly unauthorized, and his attestation to such a bond of no validity.—*Ib.* ---------- 303

6. When the principal has proposed certain names as his sureties, and these have been approved by the court, each of the sureties as he signs has both the legal and moral right to expect and rely upon the officers to see that each approved party shall sign it, and not regard it as an executed and delivered obligation until so perfected. *Ib.* ---------- 303

7. The securities who did sign the bond were under neither a legal nor moral duty to see that all the approved parties had signed it, nor to see that the sheriff should execute another bond. They had a right to rely upon the legal discharge of official duty by those whose duty it was to see a proper bond executed, and to dismiss all oversight over it.—*Ib.* ---------- 303

8. It is the duty of the court and county attorney to keep a watchful vigilance over official bonds; and the sheriff, in this case, should have been required to execute another bond, and on failure, his office should have been declared vacant.—*Ib.* ---------- 303

9. There being no record evidence that the bond as executed was ever approved by the court, nor that the securities who did sign it were approved, but the only order shown negativing this, the decision of the circuit court upon the issue of no record, and the peremptory instruction to the jury, to find for the plaintiffs, on the special plea of *non est factum*, were both erroneous.—*Ib.* ---------- 303

10. The bond itself is no record until sanctioned and accepted by the court, or executed according to its order of approval, which action of the court can only be established by its own records.—*Ib.* ---------- 303

11. On sufficient notice and motion, the sureties in a sheriff's official bond moved the county court for additional security, "in consequence of official default." After hearing the parties the court required additional security in a prescribed time, and the sheriff failing to give it, was, by order of the court, removed from office, and a successor was appointed and qualified. *The judgment of removal is affirmed.—Bartly vs. Fraine, &c.* ---------- 375

12. In a proceeding in the name of the Commonwealth, *without notice or service of process, by motion in the Franklin circuit court, against the sheriff of Harlan county and his sureties*, for failing to pay into the

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OFFICIAL BONDS—Continued.

treasury a balance of the revenue due and collectable in the year 1866, the copy of the bond filed by the Auditor shows on its face, that it was executed at the June term of the county court of said county, and not at the January or February term as required by law. Without allegation or explanation, *no judgment should have been rendered against the sheriff and his sureties on the motion; the judgment of the circuit court against them is reversed.—Calloway, &c., vs. Commonwealth* ---------- 383

13. No power or authority is conferred by the statute on the county court to take the original bond, from the sheriff for the collection of the revenue, at any other terms of their court than those named (January or February term), and no option is given to the sheriff; but if he fails to execute the bond, at one or the other of the terms prescribed, his office shall thereby be forfeited.—*Ib.* ---------- 383

14. The remedy, on motion, authorized by the statute against a defaulting sheriff, is anomalous in judicial proceedings, and, if not harsh, certainly *ex parte*, and when adopted the requirements of the statute must appear to have been complied with, and the liability of the sheriff and his sureties clearly shown.—*Ib.* ---------- 383

15. The power of the county court to require the sheriff to execute supplemental bonds at other terms of the court, after having executed a bond either at the January or February term of the court, either for the indemnity of his sureties or that of the Commonwealth, cannot be questioned.—*Ib.* ---------- 383

PARTNERS AND PARTNERSHIPS—

1. A note, executed by one partner in his individual name, for the use and benefit of the firm, is binding against the other partner who did not sign the note. A surety in such a note, after he has paid it, has a cause of action against the firm.—*Hikes vs. Crawford & Long* ---- 19

2. Each partner has a lien on the firm property. The creditors of the firm are entitled to that lien, by equitable substitution; and that lien, by subrogation, is paramount to attachment liens, created on debts which are not partnership debts.—*O'Bannon & Bashaw vs. Miller & Hopkins* ---------- 25

3. The widow of a deceased partner being sued as one of the members of the firm, made no defense, and judgment was rendered against her by default. She sued out an injunction, alleging that she was advised by one of her co-defendants that she was not bound for the debt, and

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PARTNERS AND PARTNERSHIPS—Continued.

that judgment could not be recovered against her, and that for this reason she made no defense, &c. Although not a partner, and in no-wise liable for the debt, the circuit court properly dismissed her petition and injunction.—*Hayden, &c., vs. Moore* 107

4. The "act regulating the sale of partnership property, taken in execution for the separate debt of one of the partners," approved February 12, 1858 (*Revised Statutes*, 2 *Stanton*, 513–14–15), was intended to provide only for sales of partnership property, and did not contemplate sales of the interest of a joint tenant of land.—*Brown, &c., vs. Burdett, &c.* 401

5. When partnership property has been levied on, to satisfy an execution against one of the partners, a settlement of the partnership should be made, and only the interest of that partner, subjected to sale, if any interest remains to him, on such settlement.— *Williams vs. Smith*, 540

6. It is the duty of the sheriff levying on joint property, to satisfy the separate debt of one of the owners, first to notify in writing the other joint owners, and if they fail to give the officer notice of their claim, as required by the act of February 12, 1858 (*Myers' Code, p.* 202), he may then proceed to advertise and sell the property so levied upon. If the other joint owners suspend the sale by executing bond as authorized by section 713 of the Civil Code, this will be deemed as a waiver of the notifications prescribed in said act, and the cause may be finally disposed of upon equitable principles.—*Ib.* 540

7. To a bill of exchange, accepted by one partner *in the name of the firm*, the name of the drawer and indorser was forged. This bill was sold to a bank by the partner who accepted it, and the proceeds thereof drawn by him in the firm name, by an indorsement thereof on the forged check of the drawer and indorser. Notwithstanding the forgeries, the bill having been uttered by one partner, and the proceeds thereof having been received by him *in the firm name*, each partner is liable to the bank for the amount of the bill, the officers of the bank having no knowledge of the forgeries at the time of the purchase of the bill and the payment of the money.—*Burgess vs. Northern Bank of Kentucky* 600

8. Each partner is presumed to have authority to bind the firm by the use of its name upon bills and promissory notes; and when so used, the bill or note will be deemed to be on partnership account, and bind it accordingly, unless it is clearly established that the party taking it had notice that the bill or note was made for purposes not within the

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PARTNERS AND PARTNERSHIPS—Continued.

partnership business. (*Story on Bills, sec.* 78; *Story on Promissory Notes, sec.* 72; *Bank of Kentucky vs. Brooking, &c.*, 2 *Littell*, 42; *McGowan, &c., vs. Bank of Kentucky*, 5 *Littell*, 271.)—*Ib.*..... 600

9. It is no answer to a claimant upon the firm, that the debt which he seeks to recover was contracted by one of the partners in the firm name, for a fraudulent or dishonest purpose, if the debt was incurred and the money received within the scope of the partnership business, and without the knowledge, of the other contracting party, of such fraudulent or dishonest purpose. (*Gow on Partnership*, 161.)—*Ib.* 600

PASSWAY—

1. A sale of a part of a tract of land by the patentees in 1807, is held to have implied a grant of an indispensable outlet or passway through the remainder of the tract; and a subsequent purchaser of the then unsold land is held to have taken conveyance subject to that incidental privilege, and his title passed to his successors with the same implied encumbrance.—*Thomas vs. Bertram*..... 317

2. A right of way used from 1807, by agreement of parties was slightly changed, and gates mutually put up in 1815. This arrangement being ratified by subsequent acts, was constructively an express grant of the easement. Having been enjoyed and acquiesced in until 1865, the circuit court properly refused an injunction against its use.—*Ib.*..... 317

3. The law implies a grant of a passway from uninterrupted and continued enjoyment, for more than fifty years, constructively adverse, on presumed claim of right.—*Ib.*..... 317

PATENTS FOR LAND—

1. Every survey made and patent issued, under the act of 1835, on county court certificates, for vacant and unappropriated land, which interferes with any survey or patent theretofore made or issued, is null and void. *McMillan's heirs vs. Hutcheson, &c.*..... 611

2. As a patent is a species of record, it is a general rule, that, when it appears void on its face, it can only be avoided by a direct proceeding in the nature of a *scire facias;* but—*Ib.*..... 611

3. When patents are declared void by statute, the legal nullity of the patent, may be shown collaterally, by extraneous proof of the fact that annulled it. (*Ray vs. Barker's heirs*, 1 *B. Mon.*, 368; *Dallam vs. Handley*, 2 *Marshall*, 418; *Atchly vs. Latham*, 2 *Littell*, 362; *Jennings vs. Whitaker*, 4 *Mon.*, 51; *Pearson vs. Barker & Asbell*, 4

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PATENTS FOR LAND—Continued.

Dana, 322; *Cone vs. Flynn*, *Ib.*, 501; *Taylor vs. Fletcher*, 7 *B. Mon.*, 82; *Clark vs. Jones*, 16 *B. Mon.*, 126.) *Such patents are no documentary title.—Ib.* ---------- 611

4. A survey and patent made and issued in 1849, under the act of 1835, for land which had been in adverse possession for more than thirty years, and which had been surveyed under a Virginia warrant in 1784, was utterly and absolutely null and void, and the holders of either the possessory right, or the title under the survey of 1784, was entitled to recover the land as against the holder under the void patent of 1849.—*Ib.* ---------- 611

5. A party in possession, under a patent which is declared to be void by the statute of 1835, under which it issued, stands just as he would, had he never procured a survey or patent; and as he has no title derived from the Commonwealth, the limitation of seven years for the protection of actual settlers under any such title does not apply to his settlement, under his void patent, which conferred no right or title; and in such a case, the void patent being no documentary title, twenty years' adverse and continued possession would not evict beyond his actual inclosure.—*Ib.* ---------- 611

6. Land surveyed in 1784 was sold and conveyed in 1794. Patent issued in 1850. The patent passed the legal title to the vendees, by relation. *Ib.* ---------- 611

PLEADINGS AND PRACTICE IN CIVIL CASES—

1. Plaintiffs, before answer, have the right to file an amended petition alleging material facts, and the circuit court had no judicial discretion to reject it.—*Champion, &c., vs. Robertson* ---------- 17

2. Under the general issue, the circuit court properly allowed and considered, the special finding of the jury, to the effect that the action was based upon a gambling transaction.—*Alfriend, &c., vs. Hughes* -- 40

3. The plaintiff is entitled to notice of every defense intended to be relied on, consisting of "new matter constituting a defense," by a statement of such matter, in the answer. This rule does not apply to a case like this, in which, from the plaintiff's own proof of the contract he seeks to enforce, the contract is shown to be, according to express law, absolutely void.—*Ib.* ---------- 40

4. In an action for killing a mare by chasing her with dogs by the defendant, within a field under his control, not inclosed by a lawful fence, *it was error to instruct the jury that the defendant was not liable to*

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PLEADINGS AND PRACTICE IN CIVIL CASES—Continued.

damages, if he only did what other prudent persons might have done. Jones vs. Hood 80

5. *If the plaintiff or his attorney*, before judgment, either directly or indirectly, puts a party who is not liable for the debt sued on, off his guard, or prevents him from defending the action, such conduct would entitle the injured party to relief.—*Hayden, &c., vs. Moore*, 107

6. A denial in an answer, which is not such as the Code requires, dispenses with extraneous proof.—*Moorman vs. Beauchamp* 145

7. An affirmative allegation in an answer, that the lien attempted to be enforced by the plaintiff, had been waived, is not of itself proof of such alleged waiver.—*Ib.* 145

8. In a suit against them to subject assets descended to several heirs, it was error to render a joint judgment against them. The circuit court should have ascertained the amount each heir had received by descent, and a several judgment, should have been rendered against each one for an amount not exceeding the amount so received, and not exceeding the amount, to which the plaintiff was entitled. On the trial of this issue the heirs are personally responsible for the costs, when judgment is rendered against them.—*Ransdell, &c., vs. Threlkeld's adm'r* 347

9. The provision of section 473 of the Civil Code, which requires a demand, of the debt claimed, before an action shall be brought against a personal representative, is restricted in its application to actions against personal representatives. A failure to make, such demand, is not an available ground for dismissing an action against the heirs or devisees of a decedent.—*Johnson, &c., vs. Belt* 405

10. The courts of Kentucky will not abate a suit, on a plea of the pendency of a prior suit, on the same debt and between the same parties, in a court of another State.—*Davis vs. Morton, Galt & Co.* 442

11. The reasons for electing a special judge of a circuit court, or a chancellor *pro tempore* of the Louisville chancery court, and the fact of taking the required oath, shall be entered on the order book. On appeal, this order need not be copied in the record, but will be presumed to be correct; but when it is copied, and thereby no qualification appears, the presumption of correctness is rebutted.—*Rudd, &c., vs. Woolfolk, &c.* 555

12. Consent to the special judge or chancellor *pro tempore*, will be presumed as between the original parties to the record, before the court on actual service of process, and who are not under disabilities, but

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PLEADINGS AND PRACTICE IN CIVIL CASES—Continued.

only as to them. Consent cannot be presumed against parties only constructively before the court, nor against minors or married women, nor against purchasers, who are not parties to the original record.—*Ib.* ---------- 555

13. The jury undoubtedly have the right in ejectment, as in other cases, to weigh probabilities and solve doubts as to matters of fact; but if, in their opinion, the preponderance of proof or of rational inference as to any fact on which the title depends, be not on the side of the plaintiffs, they ought not to find for them. (*Griffith vs. Dickens*, 2 *B. Mon.*, 20.)—*Patterson, &c., vs. Hansel, &c.* ---------- 654

PLEADINGS AND PRACTICE IN CRIMINAL AND PENAL CASES—

1. On the trial of an indictment for keeping a "tippling-house" in the city of Louisville, the only proof before the jury was, that spirituous liquors had been drank in the house "*more than twice*," and that the defendant had a State license to retail such liquors, and had also paid for but had not obtained, a city license. On these facts the jury was instructed in effect to find the defendant guilty. *Held*—That the instruction was erroneous, and the verdict against the defendant was not authorized by the testimony; that this court has no judicial knowledge of any ordinance requiring a city license, and no such ordinance was shown; nor did the testimony, in such a penal case, authorize the deduction that the liquor drank in the defendant's house was drank with his consent or was sold by him.—*Lucker vs. Commonwealth* ---------- 440

POSSESSION—

1. Possession, under a colorable contract of purchase by the vendee being fraudulent and voidable by the judgment creditors of the fraudulent vendor, was not adverse to the fraudulent vendee, but in trust for him.—*Daniel vs. McHenry* ---------- 277

2. Possession of land, acquired after the levy of executions thereon, was not adverse to the purchaser at the sale under the executions, because the purchase, and the rights of the purchaser, relate back to the levy. Nor can the sale, by reason of such possession, be regarded as champertous.—*Ib.* ---------- 277

3. Possession of land under a contract of purchase, is constructive notice of claim to the land.—*Goins vs. Allen, Morton & Co.* ---------- 608

4. Seisin, in its technical sense, is actual or constructive possession under a perfect legal title—it includes, as an essential element, an actual entry also.—*McMillan's heirs vs. Hutcheson, &c.* ---------- 611

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POSSESSION—Continued.

5. "Seized," as used in a power of attorney given in 1794 by a non-resident to sell lands of which he was *then seized in Kentucky*, is construed to have meant, possessed, or entitled to, in law or equity, and to have included land surveyed, but not patented. It did not appear that the maker of the power held any land in Kentucky under a patent at that time.—*Ib.* ---------- 611

6. A party in possession, under a patent which is declared to be void by the statute of 1835, under which it issued, stands just as he would, had he never procured a survey or patent; and as he has no title derived from the Commonwealth, the limitation of seven years for the protection of actual settlers under any such title does not apply to his settlement, under his void patent, which conferred no right or title; and in such a case, the void patent being no documentary title, twenty years' adverse and continued possession would not evict beyond his actual inclosure.—*Ib.* ---------- 611

7. Possession of the purchaser and his vendees of land sold under a decree of court for distribution, is held to have been adverse to the original title-holders and distributees.—*Conner and wife vs. Downer, &c.* - 631

8. Persons in possession of land not as tenants of any one, took leases from and held under the claimant, who asserted title to the land. Their possession from thenceforward was the possession of their landlord, and they would be estopped to deny his title, and, without renunciation and notice, their possession could not become adverse to such landlord.—*Patterson, &c., vs. Hansel, &c.* ---------- 654

PROCESS, ISSUE AND SERVICE OF—

1. A summons directed to the sheriff may be executed by a constable or other officer, to whom it might have been directed, at the request of the plaintiff, as provided in the Civil Code (section 66), and the return thereon, of the constable or other officer, shall be proof of the time and manner of service (section 73). (*Boaz vs. Nail*, 2 *Met.*, 245.)—*Long vs. Gaines, Berry & Co.* ---------- 353

2. "Executed by delivering a true copy to John Long." On judgment by default, the Court of Appeals cannot presume that there were other John Longs in the county than the defendant. One John Long was the defendant; the writ was served on one John Long, and when he puts in no defense, this court will presume he was the identical John Long sued.—*Ib.* ---------- 353

3. When a constable has authority to execute the process of the court having original jurisdiction of the amount of a debt placed in his

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PROCESS, ISSUE AND SERVICE OF—Continued.

hands for collection, the sureties in his official bond are liable for the amount when collected by him, which, in this case, was seventy-five dollars. (*Arnold vs. Sommers*, 3 *Bush*, 555.)—*Commonwealth for Young vs. Peters, &c.* ---- 403

4. The summons shall be returnable to the next term of the court, unless that term begins within ten days from the date of the summons, when it shall be returnable to the first day of the following term. (*Civil Code, section* 70.)—*Peters, gd'n, &c., vs. Conway* ---- 565

5. The return day of the order of arrest, when issued at the commencement of the action, shall be the same as that of the summons. (*Civil Code, section* 183.—*Ib.* ---- 565

6. An order of attachment shall be made returnable, as an order of arrest is directed to be returned. (*Civil Code*, 225.)—*Ib.* ---- 565

7. It is the legal attestation, of the officer who issues, that gives validity to process, and confers legal authority on the executing officer, to serve it, therefore, in a conflict between the words of the body of the writ over the official signature of the issuing officer, and a mere indorsement on its back, wholly unattested, the attested words must prevail. *Ib.* ---- 565

RAILROADS—

1. The implied undertaking between a Railroad Company and its employees, in the same class of service, does not exonerate the company from liability for damages, resulting to one of such co-agents, from extraordinary, or gross negligence of another of such agents, in the same line of service. The principles of the case of *Louisville and Nashville Railroad Company vs. Collins* (2 *Duvall*, 114), are adhered to without qualification.—*Louisville and Nashville Railroad Company vs. Robinson* ---- 507

2. Engineers and brakesmen are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakesman on a freight train, does not affect the reason and policy of implying, as between themselves, such associations, knowledge, and trust, as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert.—*Ib.* ---- 507

3. Gross neglect is either an intentional, or such a reckless disregard of security and right, as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which, in some respects, is *quasi criminal*.—*Ib.* ---- 507

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RAILROADS—Continued.

4. If the employee, or agent complaining of hurt, contributed to it, by his own negligence, he cannot recover damages from the Railroad Company, unless its co-operating agent, charged with gross neglect, could have avoided the impending damage, by the observance of ordinary diligence, notwithstanding the neglect of the complaining party. *Ib.* ---------- 507

5. In an action against a Railroad Company, for damages, for injuries sustained by a passenger, there being *no proof of gross negligence or wanton recklessness*, the assessment ought to be compensatory or indemnifying only, and *not for smart money.—Kentucky Central Railroad Company vs. Dills.* ---------- 593

6. If the damage resulted to the passenger solely from the negligence of the Railroad Company's agents, it is liable in this case, for compensatory damages; or,

   If it resulted solely from the negligence or temerity of the passenger himself, he is entitled to nothing; or—*Ib.* ---------- 593

7. If it was a compound result of negligence on both sides, then, as the passenger's own fault was contributory to it, he can recover nothing, unless the managing agents saw his perilous condition, and might, by ordinary diligence, have prevented the injury.—*Ib.* ---------- 593

REVENUE AND TAXATION—

1. *Shares of stock in National Banks, in Kentucky, are liable to a tax of fifty cents* on each share of one hundred dollars; and the officers of such banks can be legally compelled to pay these taxes for their respective shareholders. This is the same tax which is imposed upon State institutions, and is collected in the same mode. (*Act of February* 9, 1865, *Myers' Supplement*, 482; *Revised Statutes, sec.* 1, *art.* 2, *chap.* 83, 2 *Stanton*, 239; *and sec.* 1, *art.* 10, *chap.* 83, 2 *Stanton*, 266.)—*Commonwealth vs. First National Bank of Louisville* ---------- 98

2. A debt due or owing to a citizen of Kentucky by a citizen of another State, is taxable in Kentucky as part of the wealth of the State. *Thomas, guardian, &c., vs. Mason County Court* ---------- 135

3. If a fund belonging to a citizen of Kentucky is employed for his benefit in another State, and is there taxed as his property, it is not taxable in Kentucky.—*Ib.* ---------- 135

4. Borrowed capital in Ohio is taxable in that State as the borrower's property, and the debt due to the lender in Kentucky is taxable as the lender's property in Kentucky.—*Ib.* ---------- 135

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REVENUE AND TAXATION—Continued.

5. *Subscriptions of one thousand dollars per mile to turnpike roads in Nicholas county, by the county judge*, under the act of February 9, 1864, and acts amending said act, *were unauthorized and void*, it being admitted that an amount of stock sufficient, with the aid of said county subscription, to complete each mile of road to which such county subscriptions applied, *had not been taken by private subscription, as required by said acts.* The circuit court erred by dismissing the petition of tax-payers for an injunction, to enjoin any payment or levy on account of such unauthorized and void subscriptions.—*Clay and others vs. Nicholas County Court, &c.* ---------- 154

6. A sheriff, who collected money by illegal taxation on a void subscription to turnpikes, holds the same as a trust fund for the benefit of the tax-payers who contributed that fund. *See case next preceding this. Blair, &c., vs. Carlisle and Jackstown Turnpike Company* ------- 157

7. The law does not imply a promise upon the part of the city of Hickman to make restitution for taxes levied and paid for ten years by mistake of the law under which the levy was made. But, as the appellant helped to impose the tax, and otherwise ratified it, he was under an honorary obligation, to his fellow-citizens who, therefore, paid their portions of it, to contribute his share of the self-imposed burthen.—*Hubbard vs. City of Hickman* ---------- 204

8. TAXATION—EQUALIZATION CLAUSE.—It is the duty of the assessor to assess and list under this clause *all money, choses in action, deposits, &c.*, whether within or without this State, unless taxed by the country where situated, and also to assess and list *all tobacco, grain, and crops of past years then on hand*, and *all the growing crops, articles manufactured in the family, poultry raised, and provisions, &c., on hand*, so far as the same *may not be for family use.* From the amount of all these the assessor is required to deduct the amount of the indebtedness of the party being assessed, and also the sum of one hundred dollars. This assessment is required to be made as of the 10th day of January each year, except merchants and grocers, who are required to list their stocks as of April 10th each year. (*Revised Statutes*, 2 *Stanton*, 253–4, *and sec.* 15, *chap.* 83.)—*Barret & Co. vs. City of Henderson*, 255

9. When a city is authorized "*to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the State*," such tax must be levied as of the date, and upon the same persons and property as prescribed by the revenue laws of the State. "*Tax-payers of the city, taxable under the revenue laws of the State*," designates both the person and subject of taxation.—*Ib.* ---------- 255

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REVENUE AND TAXATION—Continued.

10. Stemmers of tobacco are required by law to list all tobacco on hand on the 10th day of January each year; but they are not liable to assessment as merchants as of April 10th each year.—*Ib.* 255

11. The district of Highlands being authorized by legislative enactment to improve roads within said district, and to levy special taxes on the real estate by or through which such roads may pass, to pay for the grading, paving, &c. (*Act of February* 27, 1867.) Said act is held to be constitutional, and the levy of a tax on the land abutting on the roads thus improved, rated by the number of acres of each owner's tract, is sustained as approaching equality as nearly as specific taxation may be expected to approximate it; and that it cannot be adjudged as unconstitutional for invidious or unjust inequality. *Malchus vs. District of Highlands* 547

SET-OFF AND COUNTER-CLAIM—

1. A purchaser, who has received a conveyance, cannot resist the payment of a balance of the purchase money on the ground of defects in the title, unless the vendor is insolvent, and the warranty of title or covenant of seisin has been broken so as to entitle the vendee to damages. Such damages, on the application of the vendee, may be set-off by the chancellor against unpaid purchase money. (*Simpson, &c., vs. Hawkins, &c.*, 1 *Dana*, 303.)—*Trumbo vs. Lockridge* 415

2. The trustees of a common school district agreed to pay a teacher, or cause him to receive, the amount of money that may be due that district for 1866, in consideration of his teaching a three months' school. There being no provision in the contract exempting the trustees from personal liability, they are personally liable on their contract. The amount of this liability may be plead as a set-off by the teacher in an action against him on a note in favor of one of the trustees. (*Civil Code, secs.* 39, 128.)—*Harrison vs. Slone* 577

3. In an action by a personal representative, a set-off verified by affidavit, and proved, without any demand for the payment thereof, may be plead by the defendant.—*Millet & Co. vs. Watkins' adm'r* 642

SHERIFFS—

1. A sheriff is responsible, when he has an execution in his hands, whether the defendants had property sufficient to pay the whole debt or a part of it.—*Commonwealth for Tiffany vs. Hurt, &c.* 64

2. If there are more defendants in the prior executions than are in those subsequently delivered, it would be the duty of the sheriff to make

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SHERIFFS—Continued.

all the debts, by collecting from the defendants who were not in some of the executions, if he could do so.—*Ib.* ---------- 64

3. A sheriff is not responsible for failing to return an execution to the proper office, if he acts in obedience to the orders of the plaintiff; but it is incumbent on him to make out his defense by evidence. A letter of the execution plaintiff's attorney, when he is proven to be such, would be evidence for the sheriff, as an excuse for failing to return execution.—*Ib.* ---------- 64

4. It is the duty of a sheriff, when he levies an execution, to state the facts on the writ and sign it.—*Ib.* ---------- 64

5. If a sheriff levies an execution on property of the defendant, and afterwards, permits him to remove or dispose of it, in such way as to deprive plaintiff of his debt, the sheriff and his sureties are liable, although no levy was indorsed on the execution. In such case *proof aliunde* would be admissible.—*Ib.* ---------- 64

6. Sureties in a sheriff's bond executed in 1865 for the collection of the county levy, &c., for that year, are not responsible for money then remaining in the sheriff's hands, which he had collected for county levies for previous years.—*Newman, &c., vs. Metcalfe County Court*, 67

7. A sheriff, who collected money by illegal taxation on a void subscription to turnpikes, holds the same as a trust fund for the benefit of the tax-payers who contributed that fund. (*See case next preceding this.*) *Blair, &c., vs. Carlisle and Jackstown Turnpike Company* ---------- 157

8. "This day came Wm. N. Peterson, who produced a certificate purporting his election as sheriff of Marshall county, and was thereupon duly sworn into office, and with R. Fletcher, P. Palmer, R. F. Stone, S. W. Harrell, James Thompson, *W. B. Ely*, H. Johnson, and Samuel Mathis, as his sureties, executed covenant as required by law.' The above is a copy of the order of approval. The evidence shows that Ely went into court to sign the necessary bonds of Peterson, and did sign the county levy and revenue bonds; and as these were the only ones presented to him, he left, supposing he had signed all the bonds necessary to be executed by the sheriff. *As "W. B. Ely" did not sign the general bond sued on, and as there is no county court order, approving this bond without his name, it is held not obligatory on the other sureties.—Fletcher, &c., vs. Leight, Barret & Co.* ---------- 303

9. County courts have constitutional power to remove sheriffs from office for failing to give new bonds at the time prescribed by the court, in a

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SHERIFFS—Continued.

proceeding by notice and motion of sureties as authorized by law. (*State Constitution, sec.* 9, *art.* 6, *and sec.* 19, *art.* 8, *and sec.* 2, *chap.* 97; *Revised Statutes*, 2 *Stanton*, 396-7.)—*Bartly vs. Fraine, &c.*— 375

10. In a proceeding in the name of the Commonwealth, without notice or service of process, by motion, in the Franklin circuit court, against the sheriff of Harlan county and his sureties, for failing to pay into the treasury a balance of the revenue due and collectable in the year 1866, the copy of the bond filed by the Auditor shows, on its face, that it was executed at the June term of the county court of said county, and not at the January or February term as required by law. Without allegation or explanation no judgment should have been rendered against the sheriff and his sureties on the motion; *the judgment of the circuit court against them is reversed.—Calloway, &c., vs. Commonwealth* ---------- 383

11. The power of the county court to require the sheriff to execute supplemental bonds at other terms of the court, after having executed a bond either at the January or February term of the court, either for the indemnity of his sureties or that of the Commonwealth, cannot be questioned.—*Ib.* ---------- 383

12. A sheriff is not bound, in his official capacity, to receive and collect taxes in arrear due to his predecessor, unless such predecessor died, resigned, or was removed from office; and as the sheriff was not bound to receive and collect such taxes, his sureties are not liable for them on his official bond. (*Edwards, ex'r, vs. Taylor, &c.*, 4 *Bibb*, 353; *Revised Statutes, sec.* 16, *art.* 9, *chapter* 83, 2 *Stanton*, 265.) *Middleton, &c., vs. Caldwell* ---------- 392

13. It is the duty of the sheriff and his deputies to receive and collect all officers' fees listed with him or any of his deputies, due and payable in his county, during his term of office, and to account for and pay over the same to the persons entitled thereto, at the time and in the manner prescribed by law; and his sureties are liable on his official bond for such officers' fees. (*Revised Statutes, sec.* 17, *art.* 1, *chap.* 91, 2 *Stanton*, 343.)—*Ib.*---------- 392

See Official Bonds, page 764.

SLANDER—

1. *Words susceptible of a two-fold meaning*, one imputing a felony and the other amounting to a trespass only, it was the province of the jury to determine, from the circumstances, in which sense they were intended and understood.—*Dedway vs. Powell* ---------- 77

2. *"It is not so!" "It's not so—no such thing!"* These words being used by a party to a suit on trial before a justice of the peace, in

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SLANDER—Continued.

reply to answers made by a witness, who was being cross-examined by him, *are actionable.* As the words are susceptible of an innocent and an offensive meaning and understanding, their determination was properly left to the jury.—*Ib.* ---------- 77

SPECIFIC PERFORMANCE—

1. Courts of equity will enforce a specific performance of a contract within the statute where it has been partly executed; for, otherwise, one party would be able to practice a fraud upon the other, which was not the intention of the statute. Great caution is to be used in the determination of what is a part execution. (1 *Story's Equity Jurisprudence, sec.* 759, *et seq.*; 4 *Bibb*, 466; 3 *Mon.*, 445; 3 *Littell*, 264.) *Overstreet vs. Rice* ---------- 1

SUMMARY PROCEEDINGS, ON MOTION—

1. On a motion for judgment on a bond suspending a sale of property levied on to satisfy an execution under section 713 of the Civil Code, in determining its sufficiency *the notice* should be considered in connection with the bond.—*Smith vs. Wells' adm'x* ---------- 92

2. In a proceeding in the name of the Commonwealth, without notice or service of process, by motion, in the Franklin circuit court, against the sheriff of Harlan county and his sureties, for failing to pay into the treasury a balance of the revenue due and collectable in the year 1866, the copy of the bond filed by the Auditor shows, on its face, that it was executed at the June term of the county court of said county, and not at the January or February term as required by law. Without allegation or explanation no judgment should have been rendered against the sheriff and his sureties on the motion; *the judgment of the circuit court against them is reversed.*—*Calloway, &c., vs. Commonwealth* ---------- 383

3. The remedy, on motion, authorized by the statute against a defaulting sheriff, is anomalous in judicial proceedings, and, if not harsh, certainly *ex parte*, and when adopted the requirements of the statute must appear to have been complied with, and the liability of the sheriff and his sureties clearly shown.—*Ib.* ---------- 383

4. Summary Proceedings.—In an action in the nature of replevin, to recover a horse, the defendant executed bond, with surety, and retained possession of the horse. Plaintiff recovered judgment for the horse, or his ascertained value, and, at the same term, moved the court for a rule against the surety to show cause why judgment should not also

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SUMMARY PROCEEDINGS, ON MOTION—Continued.

be rendered against him. On the trial of the rule, the circuit court properly refused to render judgment against the surety. Such a summary proceeding is not authorized by statute, nor is it embraced in sections 283, 479, or 484 of the Civil Code. *On such a bond, the plaintiff must proceed against the surety by an action thereon. Gay vs. Morgan, &c.* ---------- 606

SURETIES—

1. *Sureties are exonerated* in a judgment on a note by the plaintiff's forbearing to issue an execution for more than a year, in consideration of ten per cent. advanced to him by the principal obligor, without the consent of the sureties in the note.—*Champion, &c., vs. Robertson* ---------- 17

2. The obligee, when he made the contract for indulgence with the principal in the note, is presumed to have known that the other obligors were sureties, from the fact that the note was executed to himself. *Ib.* ---------- 17

3. A note, executed by one partner in his individual name, for the use and benefit of the firm, is binding against the other partner who did not sign the note. A surety in such a note, after he has paid it, has a cause of action against the firm.—*Hikes vs. Crawford & Long* --- 19

4. A surety's right of action against his principal does not accrue until he pays the debt.—*Ib.* ---------- 19

5. The statute of limitations does not commence to run against a surety *when he replevies the debt* of his principal; but it commences to run against him *when he pays the debt.—Ib.* ---------- 19

6. Sureties in a sheriff's bond executed in 1865 for the collection of the county levy, &c., for that year, are not responsible for money, then remaining in the sheriff's hands, which he had collected for county levies for previous years.—*Newman, &c., vs. Metcalfe County Court,* 67

7. A surety who is secured by mortgage on real estate, has no right to sue out an attachment against his principal, without alleging the insufficiency of the mortgage; but being induced to sue out the attachment by the defendant, whilst other creditors might do so, the defendant himself, cannot be heard to object and defeat such attachment for this cause.—*Jarboe, &c., vs. Colvin, &c.* ---------- 70

8. A surety in a tenant's bond for rent may take up the bond, and have it assigned to him, so as to substitute him to all the rights and liens of the landlord.—*Smith vs. Wells' adm'x* ---------- 92

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SURETIES—Continued.

9. "This day came Wm. N. Peterson, who produced a certificate purporting his election as sheriff of Marshall county, and was thereupon duly sworn into office, and with R. Fletcher, P. Palmer, R. F. Stone, S. W. Harrell, James Thompson, *W. B. Ely*, H. Johnson, and Samuel Mathis, as his sureties, executed covenant as required by law." The above is a copy of the order of approval. The evidence shows that Ely went into court to sign the necessary bonds of Peterson, and did sign the county levy and revenue bonds; and as these were the only ones presented to him, he left, supposing he had signed all the bonds necessary to be executed by the sheriff. *As "W. B. Ely" did not sign the general bond sued on, and as there is no county court order approving this bond without his name, it is held not obligatory on the other sureties.—Fletcher, &c., vs. Leight, Barrett & Co.*... 303

10. When the county court approves the proposed names and individuals as securities in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it until all the named securities sign it, than he has to accept it without the principal's signature. If he may waive the signature of one security, he may waive more, until all are waived.—*Ib.*..... 303

11. When the court has designated certain persons and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed in conformity to the judgment of approval, else it is not the approved and accepted bond by the court; and every alteration by the clerk, either in omitting a designated party or substituting another, is wholly unauthorized, and his attestation to such a bond of no validity.—*Ib.*..... 303

12. On sufficient notice and motion, the sureties in a sheriff's official bond moved the county court for additional security, "in consequence of official default." After hearing the parties the court required additional security in a prescribed time, and the sheriff failing to give it, was, by order of the court, removed from office, and a successor was appointed and qualified. *The judgment of removal is affirmed.—Bartly vs. Fraine, &c.*..... 375

13. In a proceeding in the name of the Commonwealth, without notice or service of process, by motion, in the Franklin circuit court, against the sheriff of Harlan county and his sureties, for failing to pay into the treasury a balance of the revenue due and collectable in the year 1866, the copy of the bond filed by the Auditor shows, on its face, that it was executed at the June term of the county court of said county, and not at the January or February term as required by law.

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SURETIES—Continued.

Without allegation or explanation no judgment should have been rendered against the sheriff and his sureties on the motion; *the judgment of the circuit court against them is reversed.—Calloway, &c., vs. Commonwealth* ---------- 383

14. Written notice by a surety in a note, to sue at the next term of the court may be waived, and a verbal notice may be accepted by the holder of the note, with the same effect, as if it had been in writing. *Hamblin vs. McAllister* ---------- 418

15. The surety answered plaintiff's petition, and alleged that he was surety only in the note sued on, and that, after the note became due, he gave the plaintiff oral notice to sue at the next term of the court, and at the same time "offered to give a written notice; but the plaintiff waived a written notice, saying, 'I do not require a written notice; I waive a written notice; a verbal notice is all that is necessary.'" The plaintiff having delayed suit for several terms of the court—*Held*—That the circuit court erred by sustaining a demurrer to the answer, and that it presented a good plea in exoneration *of the surety. Ib.* ---------- 418

16. The principal paid the obligee interest on notes past due, at the rate of ten per cent. per annum, without the consent or knowledge of his sureties, and without any agreement, upon the part of the obligee, to indulge the obligors for any fixed or definite period, or to indulge them at all. This was not a novation, and the sureties were not thereby released.—*Offutt, &c., vs. Glass* ---------- 486

17. When the plaintiff issues an execution against the defendant, a resulting lien on defendant's property inures to his surety in the appeal bond, by subrogation. If that lien is discharged by the plaintiff, such discharge will exonerate the surety in the appeal bond, and is a good defense in a suit thereon.—*Dills vs. Cecil* ---------- 579

18. Summary Proceedings.—In an action in the nature of replevin, to recover a horse, the defendant executed bond, with surety, and retained possession of the horse. Plaintiff recovered judgment for the horse, or his ascertained value, and, at the same term, moved the court for a rule against the surety to show cause why judgment should not also be rendered against him. On the trial of the rule, the circuit court properly refused to render judgment against the surety. Such a summary proceeding is not authorized by statute, nor is it embraced in sections 283, 479, or 484 of the Civil Code. *On such a bond, the plaintiff must proceed against the surety by an action thereon.—Gay vs. Morgan, &c.* ---------- 606

See Official Bonds, page 764.

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TAVERNS AND TAVERN-KEEPERS—

1. "The trustees shall have the right to tax, and right to license all taverns within the limits of said town, granting to, withholding from the same, as may be deemed expedient by said trustees, the privilege of selling by retail, wines, brandies, whisky, rum, and other spirituous liquors and intoxicating drinks, *and to fix the tax therefor in a sum not exceeding two hundred dollars on each per annum.*" This act is held to be constitutional.—*Mason vs. Trustees of Lancaster* 406

2. Tavern-keepers may be required to pay a license to towns by authority of legislative enactment, notwithstanding they have paid both the United States and State license.—*Ib.* 406

3. Innkeepers are liable for money surrendered to their custody by a guest, unless they took extraordinary care of it.— *Woodward vs. Birch, &c.* 510

4. Innkeepers are responsible for the good conduct of their employees. (*Weisenger vs. Taylor, &c.*, 1 *Bush*, 276.)—*Ib.* 510

5. A clerk in the employment of an innkeeper, being intrusted with the key of his safe, procured another key to be made. The innkeeper had knowledge of the existence of the false key, discharged his said clerk, but made no change in the lock of his safe. The clerk, some time after he was discharged from service, by means of the false key entered the safe and took therefrom money which had been deposited therein by a guest of the house. The innkeeper is responsible, notwithstanding he may have told the guest, at the time he surrendered the money to him, that his safe had recently been robbed, and that he would not be responsible for money deposited in it.—*Ib.* 510

TELEGRAMS—

1. A contract made by telegrams is binding on the parties.—*Calhoun vs. Atchison, &c.* 261

TENANTS BY ENTIRETIES—

1. TENANTS BY THE ENTIRETY.—A conveyance of land to husband and wife and their heirs, before the Revised Statutes took effect, as at common law, constituted an estate by entireties, which neither husband nor wife could sever, or make liable for debts as against the other. Death terminates the title, in such estates, of the first one dying, and the survivor acquires no new or additional title from the decedent, but holds the entire estate under and by virtue of the original conveyance.—*Elliott, &c., vs. Nichols, &c.* 502

2. In conveyances of land to husband and wife, made since the Revised Statutes took effect, as therein provided, "*unless a right by survivorship*

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TENANTS BY ENTIRETIES—Continued.

is expressly provided for, there shall be no right to the entirety by survivorship between them, but they shall take as tenants in common, and the respective moieties, be subject to curtesy or dower, with all other incidents to such a tenancy." (*Sec.* 14, *art.* 4, *chap.* 47, *Revised Statutes*. 2 *Stanton*, 27.) This change in the rule of the common law is not retrospective, and does not apply to conveyances made before the Revised Statutes took effect.—*Ib.* 502

3. As the entire title and estate was vested in both the husband and the wife *as tenants by entireties*, the legislature could not have averted any portion of the title.—*Ib.* 502

TIPPLING-HOUSES—

3. On the trial of an indictment for keeping a "tippling-house" in the city of Louisville, the only proof before the jury was, that spirituous liquors had been drank in the house "*more than twice*," and that the defendant had a State license to retail such liquors, and had also paid for, but had not obtained, a city license. On these facts the jury was instructed in effect to find the defendant guilty. *Held*—That the instruction was erroneous, and the verdict against the defendant was not authorized by the testimony; that this court has no judicial knowledge of any ordinance requiring a city license, and no such ordinance was shown; nor did the testimony, in such a penal case, authorize the deduction that the liquor drank in the defendant's house was drank with his consent, or was sold by him.—*Lucker vs. Commonwealth* 440

TOWNS AND CITIES—

1. The trustees of Poplar Plains being invested with title to a school-house and lot in said town, under an act of February 28, 1860, sold the same, and, in pursuance of the popular will of the citizens of the town, as expressed in a public meeting, reinvested the proceeds of the sale as so much stock in a seminary lot and buildings just outside of the corporation. *As the act did not require the reinvestment within the corporation, the trustees cannot be held responsible as for a misapplication of the fund.* The town cannot abandon its stock in the seminary and look to the trustees for the amount.—*Samuels, &c., vs. Trustees of Poplar Plains* 252

2. When a city is authorized "*to levy a tax upon the tax-payers of the city, taxable under the revenue laws of the State*," such tax must be levied as of the date, and upon the same persons and property as prescribed by the revenue laws of the State. "*Tax-payers of the city, taxable under*

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TOWNS AND CITIES—Continued.

the revenue laws of the State," designates both the person and subject of taxation.—*Barret & Co. vs. City of Henderson* 255

3. Town authorities, being so authorized by law, may refuse to grant a license to sell spirituous liquors to a tavern-keeper therein, and without such license, he will not be authorized to sell the same, by paying for and obtaining a license from the United States, and also from the State.—*Mason vs Trustees of Lancaster* 406

4. Town authorities may constitutionally be authorized by law to levy taxes and impose licenses for revenue, for municipal purposes. *Ib.* 406

5. In an action to charge and recover from owners of property within specified distances, their proportion of the cost of a cistern in the city of Louisville, which was required to be built by a special ordinance, "*at the exclusive cost of the owners of property chargeable therefor under the city charter and ordinances,*" the petition is demurrable, unless it pleads the general ordinance specifying the distance from the cistern within which the property shall be charged. *In such cases, it is necessary to plead both the special and general ordinance.* (*Babbitt vs. Woolley, &c.*, 3 *Bush.* 703.)—*Stephens vs. Guthrie* 462

6. The general council of the city of Louisville, by ordinance as prescribed in the city charter, may direct or authorize the sidewalks, &c., in said city to be graded and paved, &c., at the cost of the owners of property binding thereon. The council alone can determine the necessity of such improvement, as well as its kind and character. The council has no authority to refer to any other body or person the determination of these things.—*Hydes & Goose vs. Joyes* 464

7. The power to pass ordinances to improve streets is legislative, and cannot be delegated. It is, in effect, a power of taxation, which is the exercise of sovereign authority.—*Ib.* 464

8. To ordain, generally, that a street or square should be graded and paved, *or* "*so much thereof as the engineer might direct, and according to specifications to be furnished by him,*" is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things, but rather a general and unlimited letter of attorney to the engineer to have so much of a square or street as he may deem proper improved to his own liking. *To allow such an ordinance to bind the property-holder, is to destroy all the safeguards thrown around him by law.*—*Ib.* 464

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TOWNS AND CITIES—Continued.

9. Subsequent acts of affirmance by the city council cannot vitalize or validate a lifeless or invalid ordinance—one conferring no legal authority to make and let the improvements when put under contract.—*Ib.* 464

10. The payment of a tax or license, of twenty-five dollars, on each car employed by the Louisville City Railway Company to the city, as required by the contract between said company and the city, in which certain franchises are secured to said company, does not exonerate the said company from the payment of an ad valorem tax on its property, horses, stables, &c., which are assessable for municipal purposes.—*Louisville City Railway Company vs. City of Louisville,* 478

11. The exaction of ten per cent. for non-payment of the assessed tax within a prescribed time is not a penalty, for enforcing which an indictment or other judicial process is necessary; but it is only a provisional and valid increase *pro rata* of the assessment, like the assuring provision in a bond for the payment of a debt on a particular day, prescribing the additional payment of ten per cent. in the event of failure to pay on the day. Such a contract has been often adjudged to be legal and enforceable as only rightful augmentation of the debt contracted to be paid.—*Ib.* ---------- 478

TRUSTS AND TRUSTEES—

1. Husband and wife conveyed real estate to a trustee, with power to sell, to secure a debt, due by the husband to the wife, and to hold the proceeds of the sale for the separate use of the wife. A conveyance of such real estate by the trustee, in which the husband and wife joined, passed to the purchaser an indisputable title. (*Revised Statutes,* 2 *Stanton,* 32.)—*Belknap vs. Martin*---------- 43

2. When a deed of trust, vesting separate property in a married woman, expressly authorizes its subjection by her creditors, any one of her creditors has a right to avail himself of that liability for satisfying his own demand, without alleging that he was the only creditor, or making other creditors, if any, parties.—*Goldburg and wife vs. Drabelle* ---------- 426

3. "In regard to the real estate placed in the hands of my executor and trustees for the benefit of my emancipated negroes, I direct that none of said negroes shall have a right to sell their interest in the same; and upon any one attempting such sale, or upon any one or more moving off, the whole property shall remain for the use of the others; nor shall said property be sold by said trustees unless it should be-

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TRUSTS AND TRUSTEES—Continued.

come unlawful for colored free persons to remain in the State, when said trustees shall be authorized to sell the property and apply the proceeds towards establishing them in a new home elsewhere." *Held* —That the land referred to, in the above clause of the will, was designed for community property, for all the beneficiaries, so long as they could lawfully remain thereon, without any power of sale in them, and a forfeiture for any attempted sale, and also that the circuit court rightfully dismissed a petition for the sale and partition of the land.—*Robinson, &c., vs. Ficklin's ex'r* 433

VENDOR AND VENDEE—

1. If the written memorial of the sale of lands were voidable for uncertainty when first executed, this impediment may be removed by the subsequent acts of both parties.—*Overstreet vs. Rice* 1

2. When land is purchased by parents and conveyed to their minor children, the latter are mere volunteers, and stand in no more favorable attitude and have no higher equities than the parents would have had, if the land had been conveyed to them.—*Worley vs. Tuggle, &c.* 168

3. When, by mistake, oversight, or fraud, the deed or written memorial does not conform to the real contract of the parties, the chancellor can reform the deed or written memorial on satisfactory parol evidence, and then enforce a specific performance according to the real contract. In all such cases, if the mistake, oversight, or fraud, is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties, and then enforce it.—*Ib.* 168

4. In the reformation of deeds, the just rights and equities of third and innocent parties, purchasers for a valuable consideration without notice, are not to be disturbed; for, as between vendor and innocent remote vendees, the loss should fall on the one who, through his own negligence, may, to some extent, be regarded as the author of the misfortune.—*Ib.* 168

5. "I, Philip McBee, having consented to the above sale, will, at my death, give as much land to Walter McBee, as the vendee of my daughter Henrietta, as to any of the *balance* of my children. March 19, 1862."

By the above indorsement on his daughter's written contract of sale of her expectancy in his land, the father divested himself of the right of disposing of the designated portion of his land; and although he died intestate, the purchaser is entitled to an equal interest in his land by virtue of his said contract.—*McBee vs. Myers, &c.* 356

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VENDOR AND VENDEE—Continued.

6. A purchaser, who has received a conveyance, cannot resist the payment of a balance of the purchase money on the ground of defects in the title, unless the vendor is insolvent, and the warranty of title or covenant of seisin has been broken so as to entitle the vendee to damages. Such damages, on the application of the vendee, may be set-off by the chancellor against unpaid purchase money. (*Simpson, &c., vs. Hawkins, &c.*, 1 *Dana*, 303.)—*Trumbo vs. Lockridge*..... 415

7. Vendor, by a writing for a valuable consideration, bound himself to convey a tract of land to the vendee "*and his lawful children.*" At the date of the writing the vendee had three children, and after that time three more were born to him. The six children are entitled to six sevenths of the tract of land.—*Cessna, &c., vs. Cessna's adm'r, &c.*, 516

8. "CHILDREN," when inserted in a conveyance, or a bond for a conveyance, of land, *is a word of purchase* and not of limitation, and by its insertion in the bond to their father, as there were children then in being, they were parties vendees, just as much as if they had been specially named; and as children were born to him, after the date of the bond, the estate would open up to them, and *such after-born children would take their respective shares.*—*Ib.*..... 516

9. Whilst the vendee, with a bond for conveyance of land, was in possession, his vendor made a deed to other parties for the same land. The holder of the bond has a superior equitable title, and the holders of the deed and legal title may be compelled to surrender and convey the same to him.—*Goins vs. Allen, Morton & Co.*..... 608

10. When a sale and conveyance of land has been made by an agent under a genuine power of attorney, the acknowledgement of which was defective, the chancellor should compel a proper conveyance, unless there should be other sufficient preventing causes.—*Colston's heirs vs. Chaudet, &c.*..... 666

11. Whatever may have been the character of the commerce between the agent making the sale of the land, and his vendee, in making the purchase, the innocent vendees of the latter, in good faith, for valuable consideration, could not be affected thereby.—*Ib.*..... 666

WARRANTY—

1. A purchaser who has received a conveyance, cannot resist the payment of a balance of the purchase money on the ground of defects in the title, unless the vendor is insolvent, and the warranty of title or covenant of seisin has been broken so as to entitle the vendee to damages.

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WARRANTY—Continued.

Such damages, on the application of the vendee, may be set-off by the chancellor against unpaid purchase money. (*Simpson, &c., vs. Hawkins, &c.*, 1 *Dana*, 303.)—*Trumbo vs. Lockridge* ---------- 415

2. An agent's conveyance is not voidable, because he conveyed land of his principal by a less extensive warranty than the power might have authorized.—*McMillan's heirs vs. Hutcheson, &c.*---------- 611

WILLS—

1. The laws of the place where the will is made, and the testator is domiciled, *must determine who are capable* of taking under the will, and in the ascertainment of the persons *who are to take* under the will. (*Story's Conflict of Laws, secs.* 479, *a-d-e.*)—*Dunnelli, &c., vs. Dunnelli's adm'r* ---------- 51

2. The general rule is, that the will is to be construed according to the law of the place of the testator's domicil in which it is made.—*Ib.* 51

3. "All my estate, real and personal, * * * shall be equally divided among my children. * * * The share of my estate allotted to my son William R. Jacob, shall be retained by my executors, paying to him during life, quarter-yearly, the net proceeds of the rents and profits thereof; * * * but he shall have no power to sell or encumber any part of the estate allotted, or the profits thereof, or to anticipate its receipt; nor shall the same be in any way liable for his debts. After his death the property, with the unexpended avails, shall be conveyed and paid to his descendants, * * * in the same manner as it would pass by the law of descents, if the same were to descend from him. If there be no such descendants, then the same shall be conveyed and paid to his heirs."

Wm. R. Jacob died, leaving a widow and one child. In construing the foregoing clauses, &c., of the will of John I. Jacob, *the court held*, that the legal title of W. R. Jacob's share remained in the executors as trustees, and that the testator intended to carve out a life estate only to him; that he did not take a fee by implication, but only a life estate, with remainder, which passed by the will, and not by the law, to his descendants or heirs; but these devisees in remainder, though taking under the will, and not as descendants or heirs of W. R. J., still take precisely the same as though the property had descended by law from him; *and his widow took a dower interest as legatee by implication, and the child took the other estate in fee*, just precisely as though the property had been owned in absolute fee by its father, and he had died intestate.—*Jacob vs. Jacob, &c.*---------- 110

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WILLS—Continued.

4. A widow is entitled to dower, as legatee by implication, in the life estate which was devised to her husband, with remainder at his death, to pass as by the law of descents to his descendants.—*Ib.*.. 110

5. Previous clauses of a will must be construed as harmonious with subsequent clauses, and if inconsistent therewith, they must give way under a familiar rule, that the last will must prevail.—*Ib.*..... 110

6. Testator devised that the residue of his estate should be equally divided between his children, *individualized by their respective names*, and his *grandchildren* by a deceased daughter, *designating them also by their names*. For equalization among each and all of his devisees alike, without any discrimination, the testator bequeathed to each of his two grandchildren special legacies the same as he had given to each of his children. *Held*—That under this will, each of the grandchildren took the same as a child; that children and grandchildren must be understood as used for identifying the persons specially named, and not for qualifying the interest of each grandchild more than that of each child.—*Wells, &c., vs. Newton, &c.*..... 158

7. "I authorize and request my executors to make conveyances for all lands I have sold * * * when the purchase money is paid, and to sell and convey all my lands except" * * * The proceeds of the land sold, and the land requested to be sold, were bequeathed to the separate use of testator's three daughters. One of these daughters married and died childless, without having elected to keep the land requested to be sold. *Held*—That the husband of this daughter, who sued as her administrator, is entitled as such, if not in his own right, to recover her share of the proceeds of all the lands referred to in the above clauses of the will, whether it had been sold, or was therein requested to be sold, and the unsold land is required to be sold for distribution.—*Green vs. Johnson, &c.* .. 164

8. "I give to my wife * * * as much of the remainder of my estate, after my debts *is* paid, * * * as will be sufficient for her support during life; and the balance of my estate, both real and personal and mixed, I will to my daughter * * * and her children. * * * I authorize and empower my executrix and executor to sell and convey whatever property, either real or mixed, they may think best, to pay my debts, except my interest in my brother John's estate; * * that I wish to stand undisposed of for the benefit of my daughter * * * and her children." * * * *Held*—The residue of the estate having been disposed of to pay debts, the widow was entitled

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WILLS—Continued.

to her support during life out of the rental of the interest of the testator in his brother John's estate, which was not sold to pay debts. *McCasland vs. Martin, &c.* ---------- 198

9. LEGACIES "*to be paid by my executor with as little delay as practicable.*"—Legatees, having resisted the establishment of the will by a protracted litigation, are not entitled to interest on their legacies from one year after testator's death (*Rev. Stat., sec.* 2, *art.* 2, *chap.* 46, 2 *Stant.*, 2); as it did not appear that the executor had either used or loaned the money, but held it ready to discharge the legacies, the legatees are entitled to interest only from the establishment of the will.—*Commonwealth for use of Johnson, &c., vs. Lillard's ex'r* --- 398

10. "In regard to the real estate placed in the hands of my executor and trustees for the benefit of my emancipated negroes, I direct that none of said negroes shall have a right to sell their interest in the same; and upon any one attempting such sale, or upon any one or more moving off, the whole property shall remain for the use of the others; nor shall said property be sold by said trustees unless it should become unlawful for colored free persons to remain in the State, when said trustees shall be authorized to sell the property and apply the proceeds towards establishing them in a new home elsewhere." *Held* —That the land referred to, in the above clause of the will, was designed for community property for all the beneficiaries, so long as they could lawfully remain thereon, without any power of sale in them, and a forfeiture for any attempted sale, and also that the circuit court rightfully dismissed a petition for the sale and partition of the land.—*Robinson, &c., vs. Ficklin's ex'r* ---------- 433

11. Testator, a free man of color at the time he made and published his will, previous to the year 1859, had a free wife and three sons; two of them free, one a slave. He devised to his two free sons two lots in Louisville, giving his wife a life estate in one of them, and to her and said two free sons his household and kitchen furniture, and made no disposition of his other personal property. The slave son was emancipated before the death of his father in 1865. *Held*—That, though incapable of taking at the publication of the will, the emancipated son being free at the death of his father, had a descendible and distributable interest in his estate equal to his brothers, and that he should be equalized with them out of the undisposed of personalty before they should be allowed any part thereof, as provided by *section* 17, *chapter* 30, *Revised Statutes* (1 *Stanton*, 426).—*Miller vs. Miller, &c.* ---------- 482

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WILLS—Continued.

12. An ademption will not be presumed, but must appear. (*Wickliffe's ex'rs vs. Preston*, 4 *Met*, 178; *section* 1, *article* 3, *chapter* 46, *Revised Statutes*, 2 *Stanton*, 2.)—*Ib.* ---------- 482

13. An ademption, does appear, by the testators selling one of the devised lots, collecting, using, and confounding the proceeds with his other personalty, and the entire proceeds, though a small part thereof remained uncollected, should be regarded as part of his distributable personal estate.—*Ib.* ---------- 482

14. "I will that my daughter, Laura Mattingly, and her children, have my home farm at twenty-five dollars per acre; they to pay my other heirs the amount necessary to make them equal, share and share, in my estate, after deducting the amount each heir has already received, for which I hold their notes."

"I will to my beloved wife, Charity Howard, one third of my whole estate of which I die possessed."

In construing the foregoing conflicting clauses, *the court held*, that the widow was entitled to one third of the real estate of her deceased husband in fee; and that Mrs. Mattingly and her children are entitled to the two thirds of the "*home farm*," for which they must pay twenty-five dollars per acre. (*See sec.* 7, *chap.* 80, *Revised Statutes*, 2 *Stanton*, 227.)—*Howard vs. Howard's ex'r, &c.* ---------- 494

15. When two clauses of a will or two devises in a will are repugnant, and cannot stand together, the clause or devise which is posterior in local position must prevail; the subsequent words being regarded as denoting a change of intention of the testator from that previously expressed. (*Jarman on Wills*, 394, *top page; Hunt vs. Johnson, &c.*, 10 *B. Mon*, 342.)—*Ib.* ---------- 494

16. A testator died without children, leaving a widow, a brother, and three sisters, and a will containing the following among other provisions:

First. A devise to his widow (who was his executrix) of sole possession of all his estate during her life.

Second. A direction to pay his debts by the sale of certain specified property.

Third. A direction to his executrix to sell his southern property, and of the proceeds "retaining one half for her sole use and benefit; the other half to be divided in equal proportions between my brother and sisters, or, in case of the death of any of them, to their children, in such *pro rata* division as the law makes in such cases; provided,

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WILLS—Continued.

however, that from the portion going to" his brother and each of his sisters, the several debts which his brother and the respective husbands of his sisters owed to testator, should be subtracted, the husbands of the sisters being dead.

Fourth. Of his Kentucky farm, negroes, &c., or so much thereof as might remain after paying debts, as before provided, he devised to his widow one half for life, with "the right to will in fee simple one half of all my property left; the other half to be divided among my brother and sisters or their children, as above described;" provided, that if his widow should marry, then all his property to be sold "and divided amongst my brother and sisters," first paying to his widow five thousand dollars as her portion.

Held—1st. That, under these provisions of the will, the debts owing the testator by his brother and brothers-in-law are not included in the devise to his widow, but to go to his brother and sisters, to be thrown into *hotchpot* for equalizing among themselves their distributive portions.

2d. That the will does not vest in the widow, a freehold title to the southern property, but the mere possession and curation without title; and the title thus undisposed of by the will descended to the brother and sisters as heirs.

3d. That the devises to the brother and sisters were absolute, the contingent provision for the children, being intended to apply only to those of such of the primary devisees as might not survive him, and, therefore, could not take under the will.—*Flournoy, &c., vs. Flournoy, &c.* ---------- 519

WITNESS—

1. A witness having the same character of action against the same defendant, is not disqualified as a witness for the plaintiff; his similarity of interest would only go to the credibility of the witness.—*Jarboe, &c., vs. Colvin, &c.*---------- 70

2. A stockholder in a bank is a competent witness for the bank (*Civil Code, sec.* 675; *Covington and Lex. R. R. Co. vs. Ingles*, 15 *B. Mon.*, 641; *Lackey vs. Richmond and Lancaster T. P. R. Co.*, 17 *B. Mon.*, 48); and however the interest of the witness might be regarded as affecting his credit; in this case the circuit court rightly overruled the exception to his deposition, and especially so, as he is shown to have been indemnified against loss, by the result of the suit, by the corporation of which he was a member.—*Petitt & Co. vs. First National Bank of Memphis* ---------- 334

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